

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



L 786

JOINT APPENDIX

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 20478

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ORVILLE L. FREEMAN, Secretary  
of Agriculture,

Appellant

v.

CHARLES SELIGSON, Trustee In  
Bankruptcy of The Estate of  
Ira Haupt & Co.

Appellee

---

No. 20482

---

CHARLES SELIGSON, Trustee In  
Bankruptcy of The Estate of  
Ira Haupt & Co.

Appellant

United States Court of Appeals  
for the District of Columbia Circuit

v.

FILED NOV 4 1966

ORVILLE L. FREEMAN, Secretary  
of Agriculture,

*Nathan J. Paulson*  
CLERK

Appellee

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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JOINT APPENDIX

---

Relevant Docket Entries

- 1965  
Sept. 22 - Application for Exercise of Ancillary Jurisdiction Exhibits (2)  
Sept. 22 - Order authorizing the exercise of Ancillary Jurisdiction by Referee in Bankruptcy. (N) Holtzoff, J.
- 1966  
May 24 - Certificate on Petition for Review by Orville L. Freeman. MC 5-27-66  
Jun. 24 - Memorandum of Orville L. Freeman, Secretary of Agriculture, in support of petition for review; Exhibits A,B,C,D,E,F; c/s 6-23-66.  
Jun. 30 - Memorandum of Trustee of Ira Haupt & Co. in opposition to Petition to Review of the Secretary of Agriculture.  
Jul. 18 - Order denying petition for review and confirming order of Referee dated May 10, 1966; Execution and enforcement of Order of May 10, 1966 suspended until sixty (60) days from July 15, 1966. Curran, J.  
Jul. 19 - Transcript of Proceedings, Pgs. 1 - 8; 7/15/66, (Rep. Robert I. Henderson) Court's copy.  
Jul. 20 - Order vacating order entered on July 18, 1966; Petition for review denied without prejudice to petitioner's contentions herein; execution and enforcement of order of May 10, 1966 suspended until 60 days from July 15, 1966. Curran, J.  
Aug. 18 - Notice of Appeal by Petitioner; Copy to Michael A. Schuchat, Counsel for Trustee.  
Aug. 31 - Notice of Appeal by Trustee; deposit of \$5.00 by Michael Schuchat; copy mailed to Department of Justice (Fred C. Drogula).  
Sep. 6 - Motion of Orville L. Freeman, Secretary of Agriculture, for stay pending appeal; P&A; c/m 9/2/66  
Sep. 9 - Opposition of Charles Seligson, Trustee in Bankruptcy, to motion for stay pending appeal. c/m 9/9/66.  
Sep. 16 - Petitioner's reply to Respondent's opposition to Motion for Stay Pending Appeal. c/s 9/16/66.  
Sep. 23 - Order staying execution and enforcement of order of May 10, 1966 to and including January 2, 1967. Matthews, J.  
Sep. 26 - Record on Appeal delivered to USCA; for Dept. of Justice, U.S. Government.

[CAPTION . . . OMITTED]

APPLICATION FOR EXERCISE  
OF ANCILLARY JURISDICTION

(Filed September 22, 1965)

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA:

The application of CHARLES SELIGSON as Trustee, respectfully shows:

1. On October 6, 1964, applicant was duly appointed and qualified as Trustee of the Estate of Ira Haupt & Co., a Limited Partnership, which was adjudged a bankrupt in the United States District Court for the Southern District of New York on March 23, 1963.

2. By order dated September 14, 1965, a certified copy of which is annexed hereto marked Exhibit "A", applicant was authorized to institute ancillary proceedings in this Court for the purpose of conducting examinations in accordance with Section 21a of the Bankruptcy Act, 11 U.S.C. Section 44a, of COMMODITIES EXCHANGE AUTHORITY, UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES DEPARTMENT OF STATE, UNITED STATES TREASURY DEPARTMENT, UNITED STATES DEPARTMENT OF COMMERCE and the SECURITIES AND EXCHANGE COMMISSION, and such other parties, persons and agencies as may be necessary and appropriate and who maintain places of business or reside or are employed within the territorial limits of this Court.



3. The examination of the aforesaid parties and any other necessary parties under Section 21a of the Bankruptcy Act, supra, is necessary in order for applicant to properly discharge his fiduciary duties and obligation as Trustee of this Bankrupt Estate. Applicant has been duly authorized to retain as special counsel for the purpose of conducting such examination before this Court, the law firm of Gottesman & Schuchat, the members of which firm are duly admitted to practice in this Court. Annexed hereto marked Exhibit "B" is a certified copy of the order authorizing applicant to retain such law firm under a special retainer.

4. No previous application for the relief sought herein has been made to this or any other Court, except for the application which resulted in the order of the United States District Court for the Southern District of New York, annexed hereto marked Exhibit "A".

WHEREFORE, applicant respectfully prays that this Court exercise ancillary jurisdiction in the premises as authorized by Section 2a(20) of the Bankruptcy Act, supra, in aid of CHARLES SELIGSON, as Trustee herein, for the purpose hereinabove set forth and that this matter be generally referred by the Court to a Referee in Bankruptcy hereof and that said Referee be authorized to preside at such examination in accordance with said Section 21a of the Bankruptcy Act, supra, and to issue subpoenae for the appearance of witnesses and

the production of documents in connection therewith and for such other purposes as may be necessary to aid and assist applicant in the administration of this bankrupt estate.

Dated: New York, New York  
September 17, 1965

/s/ Charles Seligson  
CHARLES SELIGSON, Trustee

SELIGSON & MORRIS,  
Attorneys for Trustee  
1290 Avenue of the Americas  
New York, New York 10019  
LT 1-7510

/s/ Michael A. Schuchat  
GOTTESMAN & SCHUCHAT,  
Special Counsel for Trustee  
909 Tower Building  
Washington, D. C. 20005

EXHIBIT A

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

In the Matter

of

IRA HAUPT & CO., a Limited  
Partnership,

Bankrupt.

-----X

In Bankruptcy

No. 64 B 259

FILED Sept. 22,  
1965

ORDER AUTHORIZING TRUSTEE TO INSTITUTE ANCIL-  
LARY PROCEEDINGS AND TO CONDUCT EXAMINATIONS  
PURSUANT TO SECTION 21a OF THE BANKRUPTCY ACT.

At New York, in said District, on the 14 day of September,  
1965.

Upon the annexed application of CHARLES SELIGSON, as Trustee of the Estate of the above-named Bankrupt, dated the 10th day of September, 1965, praying for an order authorizing said Trustee to institute ancillary proceedings in the United States District Court for the District of Columbia, for the purpose of conducting examinations of the Commodities Exchange Authority, the United States Department of Agriculture, United States Treasury Department, United States Department of State, United States Department of Commerce and the Securities Exchange Commission and any other necessary parties, persons or agencies, pursuant to Section 21(a) of the Bankruptcy Act; and further authorizing the Trustee's general counsel, SELIGSON & MORRIS, his special counsel, WEIL, GOTSHAL & MANGES, Esqs., and TOWNSEND & LEWIS, Esqs., and his accountants, DAVID BERDON & CO. to attend such examination and to take such measures and actions in connection therewith as the Trustee may deem necessary and appropriate in the circumstances; and it appearing that no notice need be given and no adverse interests having been represented, and sufficient cause appearing to me therefor, it is

ORDERED, that Charles Seligson, as Trustee, be and he is hereby authorized to institute ancillary proceedings in the United States District Court for the District of Columbia, for the purpose of conducting examinations, pursuant to Section 21(a) of the Bankruptcy Act of Commodities and Exchange



Authority, United States Department of Agriculture, United States Treasury Department, United States Department of State, United States Department of Commerce and the Securities & Exchange Commission and any other necessary parties, persons or agencies within the territorial limits of said court.

/s/ Edward J. Ryan  
REFEREE IN BANKRUPTCY

**EXHIBIT B**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

In the Matter

of

IRA HAUPT & CO., a Limited  
Partnership,

In Bankruptcy

No. 64 B 259

Bankrupt.

FILED September 22,  
1965

-----X

ORDER AUTHORIZING APPOINT-  
MENT OF SPECIAL COUNSEL

At New York, in said District, on the 14 day of September, 1965.

Upon the annexed application of CHARLES SELIGSON, as Trustee of the estate of the above-named Bankrupt, verified the 10th day of September, 1965, praying for authority to employ and appoint the law firm of GOTTESMAN & SCHUCHAT as his attorneys under a special retainer to represent him as Trustee,

in connection with conducting examinations pursuant to Section 21(a) of the Bankruptcy Act, in the United States District Court for the District of Columbia and upon the annexed affidavit of Michael Schuchat, sworn to the 7th day of September, 1965, and it appearing that no notice need be given and no adverse interest having been represented, and it further appearing that Michael Schuchat and Milton M. Gottesman, members of the aforesaid firm, are attorneys duly admitted to practice in the United States District Court for the District of Columbia, and the Court having been satisfied that the said law firm represents no interests adverse to the bankrupt estate or the said Trustee in the matters upon which it is to be engaged and that the employment of said law firm as attorneys, is necessary and would be in the best interests of the estate; it is

ORDERED, that Charles Seligson, as Trustee, be, and he hereby is, authorized to employ and appoint the law firm of Gottesman and Schuchat as attorneys, under a special retainer, to represent him for the purpose of conducting examinations under Section 21(a) of the Bankruptcy Act, in the United States District Court for the District of Columbia; and it is

FURTHER ORDERED, that the compensation of the law firm of Gottesman & Schuchat for services rendered on behalf

of the aforesaid Trustee shall be hereafter fixed by this Court upon appropriate application therefor.

/s/ Edward J. Ryan  
REFEREE IN BANKRUPTCY

[CAPTION IS OMITTED]

ORDER AUTHORIZING THE EXERCISE  
OF ANCILLARY JURISDICTION

(Filed September 22, 1965)

Upon the annexed application of CHARLES SELIGSON, as Trustee of the estate of the above-named bankrupt, dated September 17, 1965, praying that this Court exercise ancillary jurisdiction in the premises as authorized by Section 2a(20) of the Bankruptcy Act, 11 U.S.C. Section 2(20), in aid of said Trustee for the purposes set forth in the annexed application and it appearing that no notice need be given and no adverse interest having been represented and it further appearing that said application is proper and should be granted and that this Court has jurisdiction over the COMMODITIES EXCHANGE AUTHORITY, UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES DEPARTMENT OF STATE, UNITED STATES TREASURY DEPARTMENT, UNITED STATES DEPARTMENT OF COMMERCE and the SECURITIES AND EXCHANGE COMMISSION and other parties, persons and agencies as may be within its territorial jurisdiction and whom the Trustee seeks to examine under Section 21a



of the Bankruptcy Act, 11 U.S.C. Section 44a, and sufficient cause appearing to me therefor; it is

ORDERED, that the application of CHARLES SELIGSON, as Trustee of the estate of the above-named bankrupt be, and it is hereby granted; and it is further

ORDERED, that this Court sit as a Court of Bankruptcy which shall exercise ancillary jurisdiction over necessary parties, persons, or agencies including but not limited to the COMMODITIES EXCHANGE AUTHORITY, UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES DEPARTMENT OF STATE, UNITED STATES TREASURY DEPARTMENT, UNITED STATES DEPARTMENT OF COMMERCE and the SECURITIES AND EXCHANGE COMMISSION, and property within its territorial limits in aid of the said CHARLES SELIGSON, as Trustee, duly appointed, qualified and acting in Bankruptcy proceedings now pending in the United States District Court for the Southern District of New York, No. 64 B 259; and it is further

ORDERED, that this proceeding be and it is hereby : referred to the HONORABLE John A. Bresnahan, Referee in Bankruptcy in and for this Court, to perform such of the duties as are by the Bankruptcy Act conferred on Courts of Bankruptcy, including such as may be incident to ancillary jurisdiction.

SIGNED, this 22nd day of  
September 1965.

/s/ Alexander Holtzoff  
United States District Judge

UNITED STATES DISTRICT COURT  
for the  
DISTRICT OF COLUMBIA

In the Matter of IRA HAUPT & CO.,  
a Limited Partnership Bankrupt

In Bankruptcy No. 70-65

To: Hon Orville H. Freeman, Secretary of Agriculture, United  
States Department of Agriculture, Washington, D.C.

YOU ARE HEREBY COMMANDED to appear in (this court) (Room 2104,  
United States Court House)

to give testimony in the above-entitled cause on the 4th day of  
November, 1965, at 2:00 o'clock p.m. (and bring with you) all docu-  
ments set forth in the schedule of documents annexed hereto

and do not depart without leave.

Harry M. Hull, Clerk.

By \_\_\_\_\_  
Deputy Clerk

Date October 19, 1965  
Ira M. Millstein, 60 E. 42nd St.,  
New York, N.Y. MU 2-7750

Michael A. Schuchat,  
909 Tower Bldg., Washington, D.C.  
628-8949  
Special Counsel for Charles Seligson,  
Trustee.

RETURN ON SERVICE

Summoned the above-named witness by delivering a copy to h\_\_\_\_  
and tendering to h\_\_\_\_ the fees for one day's attendance and  
mileage allowed by law, on the \_\_\_\_\_ day of \_\_\_\_\_,  
19\_\_\_\_, at \_\_\_\_\_

Dated \_\_\_\_\_

Subscribed and sworn to before me, a \_\_\_\_\_ this \_\_\_\_\_  
day of \_\_\_\_\_, 19\_\_\_\_

Note.--Affidavit required only if service is made by a person other  
than a U.S. Marshal or his deputy.

## DEFINITIONS

As used herein, the term "document" means the original or any copy of any book, record, paper, report, memorandum, communication, letter tabulation, chart, worksheet, analysis, summary, transcript, or other writing.

As used herein, the term "Secretary of Agriculture" means the Secretary of Agriculture or any person to whom authority has been delegated to act in his stead or on his behalf.

As used herein, the term "Act Administrator" means the Administrator of the Commodity Exchange Authority, United States Department of Agriculture, in his capacity as Administrator of the Commodity Exchange Act, or any officer or employee of the Commodity Exchange Authority to whom authority has been delegated to act in his stead or on his behalf.

As used herein, the term "Inspector General" means the Inspector General of the Department of Agriculture or any person to whom authority has been delegated to act in his stead or on his behalf.

As used herein, the term "Regulations" means the Regulations of the Secretary of Agriculture under the Commodity Exchange Act, as amended.



As used herein, the term "Chicago Board of Trade" means the Chicago Board of Trade, the Chicago Board of Trade Clearing Corporation and all committees, subcommittees or other subdivisions thereof.

As used herein, the term "New York Produce Exchange" means the New York Produce Exchange, the New York Produce Exchange Clearing Association and all committees, subcommittees, or other subdivisions thereof.

#### SCHEDULE OF DOCUMENTS

1. For the period January 1, 1960 to December 31, 1963, inclusive, all series 900, 1000 and 1100 forms filed with the Commodity Exchange Authority by clearing members of contract markets pursuant to Section 16.00 of the Regulations of the Secretary of Agriculture promulgated under the Commodity Exchange Act, as amended; or, in lieu thereof, the reports regarding clearing members filed with the Commodity Exchange Authority by the appropriate contract markets during the aforementioned period as provided in Section 16.02 of the aforementioned regulations.

2. For the period January 1, 1960 to December 31, 1963, inclusive, all series 901, 1001 and 1101 forms filed with the Commodity Exchange Authority by futures commission merchants and foreign brokers pursuant to Section 17.00 of the regulations referred to in Paragraph 1

above, and all forms designated as CEA Form 102 filed by such persons during the aforementioned period as is required by Section 17.01 of the aforementioned regulations.

3. For the period January 1, 1960 to December 31, 1963, inclusive, all series 903, 1003, and 1103 forms filed with the Commodity Exchange Authority by traders pursuant to Section 18.00 and 18.01 of the regulations referred to in Paragraph 1 above, and such documents as will indicate the identity of the reported accounts for which a code number was assigned by the Commodity Exchange Authority as provided in Section 18.02 of the aforementioned regulations.

4. All documents which indicate, disclose or otherwise relate to any investigation made by the Secretary of Agriculture pursuant to Section 8 of the Commodity Exchange Act, during the period January 1, 1960 to December 31, 1964, with respect to market conditions in the cash and futures markets for cottonseed oil and soybean oil.

5. All documents relating to the cash and futures markets for cottonseed oil and soybean oil which were furnished by the Secretary of Agriculture pursuant to Section 8 of the Commodity Exchange Act to producers, consumers or distributors of these commodities during the period January 1, 1960 to December 31, 1964.

6. All documents which indicate, disclose or otherwise relate to any investigation made by the Secretary of Agriculture or the Act Administrator pursuant to Section 8 of the Commodity Exchange Act with respect to the operations of the New York Produce Exchange concerning transactions in cottonseed oil during the period January 1, 1963 to December 31, 1963, and the operations of the Chicago Board of Trade concerning transactions in soybean oil during the aforementioned period, including, but not limited to, any investigation concerning the actual or alleged failure of the New York Produce Exchange or the Chicago Board of Trade to prevent a manipulation of prices or cornering with respect to cottonseed oil and soybean oil during said period.

7. All documents which indicate or disclose the names, addresses, and amounts of cottonseed oil or soybean oil futures contracts purchased or sold by any or all persons trading in cottonseed oil on the New York Produce Exchange and/or soybean oil on the Chicago Board of Trade which were disclosed or made public by the Secretary of Agriculture during the year 1963 pursuant to Section 8 of the Commodity Exchange Act and all documents which indicate or disclose the persons, firms or organizations to which such information was disclosed.

8. All documents which disclose or reflect any information concerning the cash and futures markets for cottonseed oil and soybean oil, any transaction or market operation with respect thereto, or any person, firm or organization trading in such commodities, which was communicated or disclosed during the year 1963 by the Secretary of Agriculture, the Act Administrator or any other officer or employee of the Department of Agriculture pursuant to Sec. 8a(6) of the Commodity Exchange Act or Section 1.5 of the Regulations, to the Chicago Board of Trade or the New York Produce Exchange or any committee, subcommittee, officer, director or other employee thereof; and all documents which disclose or indicate the substance of any discussion, whether written or oral, between or among any officer or employee of the Department of Agriculture and any officer, director or other employee of the New York Produce Exchange or the Chicago Board of Trade with respect to the information communicated or disclosed in the manner described above.

9. All documents which indicate, disclose or reflect any recommendation, proposal or suggestion concerning the cash and futures markets for cottonseed oil and soybean oil, any transaction or market operation with respect thereto, or any person, firm or organization trading in such commodities, which was made or transmitted during the



year 1963 by the Secretary of Agriculture, the Act Administrator or any other officer or employee of the Department of Agriculture, to the Chicago Board of Trade or the New York Produce Exchange or any committee, subcommittee, officer, director or other employee thereof; and all documents which disclose or indicate the substance of any discussion, whether written or oral, between or among any officer or employee of the Department of Agriculture and any officer, director or other employee of the New York Produce Exchange or the Chicago Board of Trade with respect to such recommendation, proposal or suggestion and the action, if any, taken with respect thereto and/or as a result thereof.

10. All documents which indicate or disclose any communication during the period January 1, 1960 to December 31, 1963, between the Secretary of Agriculture, the Act Administrator or any other officer or employee of the Department of Agriculture and Anthony DeAngelis or any other officer, director or employee of Allied Crude Vegetable Oil Refining Corporation.

11. All documents which indicate or disclose any communication during the year 1963 between the Secretary of Agriculture, the Act Administrator or any other officer or employee of the Department of Agriculture and any person,

firm or organization, other than a contract market or representative thereof, with respect to the cash and futures market for cottonseed oil and soybean oil, any transaction or market operation with respect thereto, or any person, firm or organization trading in such commodities.

12. All documents for the period January 1, 1935 to December 31, 1963, which indicate, disclose or reveal the facts or circumstances concerning any investigation of the Chicago Board of Trade or the New York Produce Exchange by the Secretary of Agriculture or the Act Administrator for failing to prevent a manipulation of prices or cornering of any commodity by the dealers or operators on such contract markets, or any suspension or revocation of the designation of the Chicago Board of Trade or the New York Produce Exchange as contract markets pursuant to Section 6(a) of the Commodity Exchange Act for such failure.

13. All documents which indicate or disclose the facts or circumstances concerning any complaint served by the Secretary of Agriculture pursuant to Section 6(b) of the Commodity Exchange Act upon any person other than a contract market charging that such person has manipulated or attempted to manipulate the price of any commodity traded upon the Chicago Board of Trade or the New York Produce Exchange during the period January 1, 1935

to December 31, 1963; and all documents which indicate or disclose the outcome of any such complaint including the suspension or revocation of the registration of any futures commission merchant or floor broker or the refusal to any other person of trading privileges on the above-mentioned contract markets.

14. All documents which concern crop or market information relating to cottonseed oil or soybean oil or which concern conditions affecting or tending to affect the price of such commodities which were furnished to the Commodity Exchange Authority during the year 1963 pursuant to Section 1.40 of the Regulations.

15. All documents which indicate or disclose any information concerning the execution, in soybean oil or cottonseed oil futures during the year 1963, of transactions commonly called "pass-outs" and which information was furnished to the Commodity Exchange Authority by any member of the Chicago Board of Trade or New York Produce Exchange pursuant to Section 20.00(a) of the Regulations; or all documents containing such information which were furnished to the Commodity Exchange Authority by clearing members of the abovementioned contract markets as provided in Section 20.00(b) of said Regulations.

16. All documents prepared by, or formerly in the possession or under the control of, Ira Haupt & Co. and of any of its partners, agents or employees, during the period January 1, 1960 to present, and presently in the possession or under the control of the Secretary of Agriculture, the Act Administrator or the Inspector General, exclusive of those documents required to be produced pursuant to the other provisions of this subpoena.

17. All documents which contain information concerning complaints or intelligence received, concerning investigations made, or reflecting a course of conduct or regulatory action adopted, by the Secretary of Agriculture, the Act Administrator and the Inspector General into the operations and affairs of Ira Haupt & Co. or of any of its partners and employees, exclusive of those documents required to be produced pursuant to other provisions of this subpoena for the period January 1, 1960 to present.

18. All documents which contain information concerning complaints or intelligence received, concerning investigations made, or reflecting a course of conduct or regulatory action adopted, by the Secretary of Agriculture, the Act Administrator and the Inspector General into the operations and affairs of Allied Crude Vegetable Oil Refining Corporation, any Corporation affiliated with Allied Crude



Vegetable Oil Refining Corporation, Anthony DeAngelis, Gerald Gittleman, Benjamin Rotello and Leo Bracconeri, exclusive of those documents required to be produced pursuant to other provisions of this subpoena, for the period January 1, 1960 to present.

19. All documents which contain information concerning complaints or intelligence received, concerning investigations made, or reflecting a course of conduct or regulatory action adopted, by the Secretary of Agriculture, the Act Administrator and the Inspector General with respect to the operations and affairs of Bunge Corporation, American Express Company, American Express Warehousing, Ltd., Harbor Tank Storage Company, Inc., J.R. Williston & Beane and D.R. Comenzo & Co., exclusive of those documents required to be produced pursuant to other provisions of this subpoena, for the period January 1, 1960 to present.

[CAPTION & OMITTED]

PETITION FOR EXAMINATION OF  
HON. ORVILLE H. FREEMAN UNDER § 21(a)  
(Filed October 21, 1965)

TO THE HONORABLE JOHN A. BRESNAHAN,  
REFEREE IN BANKRUPTCY:

The Petition of Charles Seligson, as Trustee, respectfully shows:

1. On October 6, 1964, in bankruptcy proceedings before the United States District Court for the Southern District of New York (In Bankruptcy No. 64 B 259), petitioner was duly appointed Trustee of the estate of the above named bankrupt, and has duly qualified and is now acting as such.

2. On September 22, 1965, upon application of the Trustee, this Court entered an Order herein authorizing the exercise of ancillary jurisdiction over the Commodity Exchange Authority and United States Department of Agriculture, inter alia, and referred the proceeding to the Honorable John A. Bresnahan, Referee in Bankruptcy, to perform such duties as are by the Bankruptcy Act conferred on Courts of Bankruptcy, including such as may be incident to ancillary jurisdiction.

3. Bankrupt is a brokerage firm which suffered losses in excess of twenty million dollars by reason of the losses of its customer Allied Crude Vegetable Oil Refining Corporation in the cottonseed oil and soybean oil commodity markets.

4. In order to discharge the Trustee's fiduciary responsibilities to investigate the acts, conduct and property of the bankrupt, it is necessary that the Trustee examine the documents set forth in the Schedule of Documents attached hereto. All of said documents are within the custody and control of the Honorable Orville H. Freeman, Secretary of Agriculture. The Trustee has requested appropriate officials of the Department of Agriculture to permit examination of the documents in the attached Schedule but said request has been refused.

5. The Trustee is seeking to determine from this examination whether a cause of action exists in the bankrupt arising from losses in the cottonseed oil and soybean oil futures markets. The documents to be examined consist of trading reports relating to trades in cottonseed oil and soybean oil futures, investigative reports of market conditions, and communications between the Department of Agriculture, Commodities Exchange Authority, Chicago Board of Trade and the New York Produce Exchange relating to the aforesaid commodity markets.

WHEREFORE, your petitioner prays that the said Honorable Orville H. Freeman, Secretary of Agriculture be required to appear for examination pursuant to § 21(a) of the Bankruptcy Act before the Honorable John A. Bresnahan, Referee in Bankruptcy and bring with him the documents set forth in the Schedule of Documents attached hereto.

/s/ Michael A. Schuchat  
Michael A. Schuchat  
Attorney for Charles Seligson,  
Petitioner

IRA M. MILLSTEIN  
WEIL, GOTSHAL AND MANGES  
60 East 42nd Street  
New York, N.Y.  
(Murray Hill 2-7750)

MICHAEL A. SCHUCHAT  
GOTTESMAN AND SCHUCHAT  
909 Tower Building  
Washington, D.C. 20005  
(National 8-8949)

Attorneys for Petitioner





[CAPTION OMITTED]

ORDER FOR EXAMINATION OF HON.  
ORVILLE H. FREEMAN PURSUANT TO § 21(a)

(Filed October 21, 1965)

AT WASHINGTON, D.C., this 21st day of October, 1965,

Upon the annexed petition of Charles Seligson, Trustee herein, dated October 20, 1965, praying for the examination of the Honorable Orville H. Freeman, Secretary of Agriculture, it is

ORDERED that Honorable Orville H. Freeman, Secretary of Agriculture be, and he hereby is required to appear before the Honorable John A. Bresnahan, Referee in Bankruptcy at Room 2104, United States Court House, Washington, D. C., at 2:00 P.M., November 4, 1965 and to bring with him the documents set forth in Schedule attached to the annexed petition of Charles Seligson, Trustee.

JOHN A. BRESNAHAN  
Referee in Bankruptcy

I hereby certify that the foregoing is a true copy of the original thereof now on file in my office.  
Dated this 21 day of October, 1965.

/s/ John A. Bresnahan  
John A. Bresnahan, Referee in Bankruptcy

[CAPTION IS OMITTED]

MOTION TO QUASH, OR, ALTERNATIVELY,  
TO MODIFY SUBPOENA DUCES TECUM  
(Filed January 10, 1966)

Secretary of Agriculture Orville L. Freeman, by his attorneys, hereby moves for a protective order pursuant to Rules 30(b) and 45(b) of the Federal Rules of Civil Procedure, quashing or, alternatively, modifying the subpoena duces tecum served upon him in the above matter on October 22, 1965. The grounds for this motion are that the subpoena is burdensome and oppressive; that the subpoena is too broad and sweeping in scope; that there is no good cause for production of the documents sought; that many of the documents are presently being used by the Department of Agriculture and the Department of Justice in investigations of possible violations of Federal law; and that many of the documents sought are not subject to production under Section 8 of the Commodity Exchange Act, 7 U.S.C. 12.

In support of this motion the attached affidavits of Alex C. Caldwell, Administrator of the Commodity Exchange Authority, and Lester P. Condon, Inspector General of the United States Department of Agriculture, are filed herewith and made a part hereof.

\_\_\_\_\_  
JOHN W. DOUGLAS  
Assistant Attorney General

\_\_\_\_\_  
HARLAND F. LEATHERS

\_\_\_\_\_  
FRED W. DROGULA  
Attorneys, Department of Justice  
Attorneys for Orville L. Freeman

[CAPTION: OMITTED]

AFFIDAVIT  
(Filed January 10, 1966)

Washington                    }  
District of Columbia        } ss.

Alex C. Caldwell, being duly sworn, deposes and says:

1. I am the Administrator of the Commodity Exchange Authority, United States Department of Agriculture, and as such am generally responsible for administration of the Commodity Exchange Act (7 U.S.C. 1 et seq.) and have custody of the records of the Authority on behalf of the Secretary of Agriculture.

2. I have read the Petition and Order for the Secretary of Agriculture to appear before the Referee in Bankruptcy in the above-captioned proceeding and produce documents described on a schedule annexed to the Petition.

3. (a) Many of the documents demanded are prohibited from disclosure by section 8 of the Commodity Exchange Act (7 U.S.C. 12). Section 8 in part provides: (7 U.S.C. 12)

"For the efficient execution of the provisions of this chapter, and in order to provide information for the use of Congress, the Secretary of Agriculture may make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade, whether prior or subsequent to the enactment of this chapter, and may publish from time to time, in his discretion, the results of such investigation and such statistical

information gathered therefrom as he may deem of interest to the public, except data and information which would separately disclose the business transactions of any person and trade secrets or names of customers: Provided, That nothing in this section shall be construed to prohibit the Secretary of Agriculture from making or issuing such reports as he may deem necessary relative to the conduct of any board of trade or of the transactions of any person found guilty of violating the provisions of this chapter under the proceedings prescribed in section 8, 9 and 15 of this title: Provided further, That the Secretary of Agriculture in any report may include the facts as to any actual transaction. ..."

In 1947 section 8 was amended by the addition of the following provisions: (7 U.S.C. 12-1)

"Notwithstanding the provisions of section 12 of this title or of any other law, the Secretary of Agriculture may, in his discretion, from time to time disclose and make public the names and addresses of all traders on the boards of trade on the commodity markets with respect to whom the Secretary has information, and any other information in the possession of the Department of Agriculture relating to the amount of commodities purchased or sold by each such trader; and when requested by any committee of either House of Congress, acting within the scope of its jurisdiction, shall furnish to such committee and make public the names and addresses of all traders on such boards of trade with respect to whom the Secretary has information, and any other information in the possession of the Department of Agriculture relating to the amounts of commodities purchased or sold by each such trader."

Section 2a(6) of the Act (7 U.S.C. 12a(6)) provides:

"The Secretary of Agriculture is authorized-- ...

(6) to communicate to the proper committee or officer of any contract market and to publish notwithstanding the provisions of section 12 of this title, the full facts concerning any transaction or market operation, including the names



of parties thereto, which in the judgment of the Secretary of Agriculture disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers and consumers."

- (b) Section 8 of the Commodity Exchange Act and similar provisions in its predecessor, the Grain Futures Act, have been construed by this Department for over 43 years as prohibiting the revealing to any person of information obtained under the Act that would separately disclose the business transactions, trade secrets, or names of customers of any person, except as incidental to the administration or enforcement of the Act or as specifically provided for in the Act.
- (c) The authority to disclose information under the section 8 provisos is limited to reports relative to the conduct of any board of trade or the transactions of any person found guilty of violating the Act in administrative proceedings under section 6 of the Act (7 U.S.C. 8, 9 and 15). The official records of all administrative proceedings under section 6 within the description of any paragraph of the schedule attached to the Petition are on file for public inspection in the Office of the Hearing Clerk of this Department and are available to the petitioner.

- (d) The 1947 amendment of section 8 authorizes the Secretary to "disclose and make public the names and addresses of all traders on the boards of trade on the commodity markets with respect to whom the Secretary has information, and any other information in the possession of the Department of Agriculture relating to the amount of commodities purchased or sold by each such trader....." Section 8a(6) authorizes the Secretary to "publish" the full facts concerning any transaction or market operation, including the names of the parties thereto, which in his judgment disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers and consumers. The 1947 amendment of section 8 and section 8a(6) authorize a release of information otherwise prohibited from disclosure by section 8 only if the information is made available to the public generally and do not authorize the disclosure to selected persons only.
- (e) However, section 8 does not prohibit the Department from making available to the petitioner, as Trustee in Bankruptcy for Ira Haupt & Co., any reports filed with the Commodity Exchange Authority, any correspondence between said company and the Authority and any facts obtained from the records

of said Company. In this situation no breach of confidence is involved because this information is presumed to be included in the records of Ira Haupt & Co. which are in the possession of the Trustee.

4. The exercise of the authority to disclose otherwise restricted information under the provisos of the 1947 amendment of section 8 or under section 8a(6) of the Act is within the discretion of the Secretary of Agriculture except in cases under the 1947 amendment wherein a request for information is made by a Congressional Committee. No such request is involved in this proceeding.

5. The section 8 provisos would authorize only reports with respect to the conduct of a board of trade or transactions of a person found guilty of violating the Act in administrative proceedings under section 6 of the Act. Most of the persons concerning whom information is sought by the petitioner have not been found guilty of any violations of the Act in such proceedings, and the provisos would not authorize disclosure of any information concerning them. Further, the official records in section 6 proceedings are on file for public inspection in the Office of the Hearing Clerk of this Department, where they are available to the petitioner, and therefore there is no apparent need in this case for the exercise of the discretionary authority under the section 8 provisos.

6. The 1947 amendment of section 8 would authorize the disclosure, in the discretion of the Secretary, only of the names and addresses of traders and information as to the amount of commodities purchased or sold by each trader, and these facts would have to be made available to the public generally with respect to all the traders in the commodities involved on the contract markets involved during the pertinent period insofar as the facts are known to the Secretary.

7. Public disclosure of the business transactions of traders on the commodity markets could be extremely damaging to the traders concerned, especially those who merchandise, store, or process such commodities and use the futures markets to "hedge" their positions in the cash commodities or their processing requirements to protect themselves from losses resulting from changes in the values of the cash commodities during the time they are processing or marketing the commodities. Such persons "hedge" their cash commodity operations by assuming a position in the futures market opposite and approximately equal to their position in the actual commodity, thus largely neutralizing the effect of price movements in either direction and avoiding much of the risk of speculative loss. They sell futures contracts to protect against price declines on inventories owned or fixed-price purchase commitments held by them. They buy futures to protect against price rises affecting fixed-price sales commitments they have

made and against which they have no inventories or purchase commitments. By their futures operations the hedgers shift the hazards of price fluctuations from themselves to speculators who wish to assume such risks in the hope of financial gain. The use of futures contracts for hedging purposes enables the commodity merchandisers to reduce greatly the element of price risk and to operate more efficiently and with a smaller gross margin of profit. Similarly, processors regularly make use of the futures markets to insure supplies for future needs at definitely fixed prices, which enables them to make commitments for their products that would be extremely hazardous if not accompanied by some protection from price risks. A disclosure of the names and addresses of "hedgers" and their transactions would reveal to their competitors the extent of their involvement in merchandising, storing, or processing a commodity because of the usually close relationship between the futures position and the total volume of their actual commodity operations, e.g. inventory holdings. It would disclose to competitors the pattern of trading followed by the trader and serve as an indicator of the normal trading that could be expected to be done by such trader in the future.

8. A sampling of the views of commodity futures traders, futures commission merchants and contract markets shows strong opposition to the release of any information obtained under the



Commodity Exchange Act which would disclose the business transactions, trade secrets, or names of customers of the commission merchants or the business transactions or trade secrets of the commodity futures traders. Such opposition is based principally on the views that such a release would be harmful to the business of such merchants and traders and that the provisions of the Act compelling them to furnish information to the Secretary for purposes of administration of the Act should not be used as a means of collecting information for the use of private litigants in cases in which the merchants and traders are not parties and therefore are not in position to resist the demands for the information.

9. The impact of such disclosure would tend to cause substantial traders, particularly hedgers, to curtail their operations and withdraw from the futures markets, thus denying them the price protection advantages afforded by the futures market and quite possibly forcing them to change their pricing practices with respect to the products they sell so as to compensate for the increase in the price risk during the period in which a commodity is being held, merchandised, or processed. This could result in lower prices to producers and higher prices for consumers. The withdrawal from the futures market of persons engaged in merchandising, storing, and processing commodities would make the markets

largely speculative in character and deprive them of the stabilizing effect of the participation of the cash interests and diminish their utility as indicators of the market value of cash commodities. This could result in destroying the value of the futures markets and thus adversely affect the public interests.

10. Under section 8a(6) the Secretary has discretionary authority to furnish to the contract markets and to "publish" the full facts concerning any transaction or market operation which in his judgment disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers and consumers. Most of the transactions and operations concerning which the schedule demands information are not in this category and therefore section 8a(6) would not authorize the Secretary to release information concerning them. Further, any facts released in this proceeding under section 8a(6) would have to be published. This would entail a substantial burden to the Department and be detrimental to the traders and the market involved as set forth in paragraphs 7 through 9, supra.

11. Moreover, exercise of the discretionary authority of the Secretary to disclose certain types of information under the various provisions of the Act, or requiring the Secretary to make available to the petitioner any information within the prohibition of section 8, is not necessary to enable

the petitioner to obtain the information he desires since it is available from other sources such as the records of the futures commission merchants and traders. Many of the futures commission merchants and traders who furnished their views to the Authority opposing the release by the Authority to the petitioner of information within the prohibition of section 8 indicated their recognition of the fact that their own records were subject to compulsory process on behalf of the petitioner and in one instance a trader expressed a willingness to make his records available to the petitioner.

12. The disclosure to the petitioner, as Trustee in Bankruptcy for Ira Haupt & Co., and his representatives, in this proceeding, of business transactions, trade secrets, and names of customers obtained under the Commodity Exchange Act would be detrimental to the public interests and the private interests of traders and futures commission merchants as indicated in paragraphs 7 through 9 to the extent that the information so disclosed then became generally known to the public and especially the competitors of such traders and merchants, through inclusion in public records of the Court or by other means.

13. Disclosure in this proceeding of information which is within the prohibition of section 8 would constitute an unfortunate precedent which would inevitably destroy the confidentiality of information furnished to the Department of Agriculture under the Commodity Exchange Act.

14. In view of the facts set forth in paragraphs 3 through 13, the Secretary is prohibited from making available to the petitioner or his representatives in this proceeding any information developed under the Commodity Exchange Act which would separately disclose information not presumably included in the records of Ira Haupt & Co., concerning the business transactions, trade secrets, or names of customers of any person.

15. This prohibited category includes the reports (other than Haupt's) filed by traders, futures commission merchants, and others called for by paragraphs 1, 2 and 3 of the schedule annexed to the Petition. There are about 313,000 of such reports. There were many traders who dealt in cottonseed oil or soybean oil during the four year period covered by these paragraphs. Few of them were involved in violations of the Act or activities detrimental to the market and most of them are in no way involved in this proceeding.

16. An examination has been made of examples believed to be representative of other classes of documents called for by the schedule. On the basis thereof, it appears that material that would come within the prohibited category under section 8 is contained in documents relating to investigation of market conditions within the description of paragraph 4 of the schedule insofar as they were incidental to investigations of the operations of specific persons, certain documents reflecting information within the demand of paragraph 8

of the schedule which was furnished to the Chicago Board of Trade and the New York Produce Exchange, and file memoranda concerning discussions between representatives of these contract markets and representatives of the Commodity Exchange Authority, within the demand of paragraphs 8 and 9. This is also believed to be true of documents concerning communications between representatives of the Department and Anthony DeAngelis or other representatives of Allied Crude Vegetable Oil Refining Corporation, called for by paragraph 10 of the schedule, and the broad class of documents demanded by paragraph 11 of the schedule with respect to any communications during 1963 between any officer or employee of this Department and any person, other than a contract market representative, with respect to the cash and futures market for cottonseed oil and soybean oil, and other matters. The demand of paragraph 13 of the schedule also encompasses information which may disclose business transactions, trade secrets and names of customers beyond that which is a matter of public record in the Office of the Hearing Clerk with respect to the administrative proceedings under section 6 of the Act. On the basis of examination of representative examples of the classes of documents demanded by paragraphs 17, 18, and 19, it appears that these classes of documents also reveal the business transactions, trade secrets, and names of customers of various persons so as to be prohibited from disclosure by



section 8 of the Act. However until the documents within the scope of paragraphs 4, 8, 9, 10, 11, 13, 17, 18 and 19 are reviewed in detail, it will not be known exactly which of them contain information within the class prohibited from disclosure by section 8.

17. The principal documents within the files of the Commodity Exchange Authority which appear to come within the scope of paragraphs 17, 18 and 19 of the schedule annexed to the Petition are reports of investigations made by the Authority with respect to various persons. The Authority, through its investigative unit, the Compliance Division, conducts most of the investigations made to determine compliance with the Commodity Exchange Act. These investigations ordinarily involve auditing the records of the person under investigation and frequently include interviewing such person and his employees and any other persons believed to have some knowledge of the facts involved. In a few cases, supplementary investigations under the Act have been conducted by the Office of the Inspector General. Based on an examination of samples, it appears that the investigation reports of both agencies include information that separately discloses the business transactions, trade secrets, and names of customers of the subject of the investigation and in many cases also of persons not implicated in any way in any violation of the Act. The reports state the names of the persons interviewed and the interviews with persons

other than the subject of the investigation are usually conducted with the understanding that the information which they furnish will be kept confidential except as it may be used in proceedings under the Act. If the sources of such information are not kept confidential at least to the extent it will be much more difficult to obtain information in future cases because informants will hesitate to risk the possibility of institution of action for slander or economic reprisal of various types. It would be highly impracticable in some cases to eliminate from the reports all information disclosing the identity of persons interviewed since the subject matter of the interviews in such cases itself identifies the informants.

18. The investigation reports reflect the evaluation of the facts made by the investigators and frequently set forth their expert opinions whether the facts disclose manipulation of prices or other activities in violation of the Act, and the reports are often accompanied by memoranda between officials in this Department or between this Department and the Department of Justice, containing recommendations as to prosecution or administrative action, and memoranda reflecting the legal advice of the Office of the General Counsel concerning the matters covered by the reports. A candid exchange of views between the Government personnel involved with respect to the subject matter of investigations will be impaired in the future if such evaluations, opinions and recommendations are subject to disclosure in proceedings such as this and the

enforcement of the laws administered by the Department will be made more difficult.

19. For reasons indicated below, the order for production of documents would impose a substantial burden on the Department insofar as it relates to documents not heretofore made available to the petitioner.

(a) Paragraph 10 of the schedule calls for all documents indicating or disclosing any communication between any officer or employee of this Department and Anthony DeAngelis or any other officer, director, or employee of Allied Crude Vegetable Oil Refining Corporation during the four year period January 1, 1960 - December 31, 1963; and paragraph 11 of the schedule calls for all documents which indicate or disclose any communication during 1963 between any officer or employee of this Department and any person, firm, or organization other than a contract market or representative thereof with respect to the cash and futures market for cottonseed oil and soybean oil, any transaction or market operation with respect thereto, or any person, firm, or organization trading in such commodities. This is broad enough to include documents relating to activities under any laws administered by this Department.

(b) Paragraphs 17, 18 and 19 of the schedule call for all documents concerning complaints or intelligence received or investigations made, or reflecting a course of conduct adopted by the Secretary of Agriculture, the Act Administrator

and the Inspector General during a six year period with respect to the operations and affairs of Ira Haupt & Co., or any of its partners or employees, Allied Crude Vegetable Oil Refining Corporation, any corporation affiliated with it, Anthony DeAngelis, Gerald Gittleman, Benjamin Rotello, Leo Braconneri, Bunge Corporation, American Express Company, American Express Warehousing, Ltd., Harbor Tank Storage Company, Inc., J. R. Williston & Beane, and D. R. Comenzo & Co. This could include any investigations made by the Secretary to determine whether any of these persons and companies have complied with the provisions of any laws administered by the Department of Agriculture, e.g. the Commodity Exchange Act (7 U.S.C. 1 et seq.), the Plant Quarantine Act (7 U.S.C. 151 et seq.), the Agricultural Trade Development and Assistance Act of 1954 (Pub. Law 480) (7 U.S.C. 1691 et seq.), the United States Warehouse Act (7 U.S.C. 241 et seq.), or the Meat Inspection Act (21 U.S.C. 71 et seq.). These laws are administered by various agencies within the Department and most of such agencies have conducted their own investigations to determine compliance with the laws they administer, although some investigations for such purposes have been made by the Office of the Inspector General.

(c) If the demand of the schedule is meant to be this sweeping, it would require a search of the records of at least six major agencies of the Department - the Commodity

Exchange Authority, the Consumer and Marketing Service, the Agricultural Research Service, the Foreign Agricultural Service, the Office of the Inspector General, and the Office of the General Counsel. These agencies operate independently and maintain separate records. There is no single office in which the records of all such agencies are filed. The documents may be found in the Washington offices of such agencies or in their field offices or in the various Federal Records Centers to which files of such agencies are shipped after the expiration of certain periods which vary for the different agencies. Federal Records Centers are located in New York, Chicago, and numerous other cities throughout the United States. For example, some of the documents in the files of the Commodity Exchange Authority which appear to be within the scope of the schedule may be contained in the Headquarters files in Washington, D. C., some in the field office files in Chicago and New York, and some in Federal Records Centers in those two cities.

(d) Even if the schedule is meant to call only for documents relating to commodity futures trading, it would require the production of documents in the files of at least three separate agencies of this Department - the Commodity Exchange Authority, the Office of the General Counsel, and the Office of the Inspector General.

(e) Assembling the various reports in the Commodity Exchange Authority files, as called for by paragraphs 1, 2 and 3



of the schedule, would require approximately 240 manhours of work at an estimated cost to the Authority of \$600.

(f) In order to locate every document within the files of the Commodity Exchange Authority within paragraph 11, it would be necessary to examine every file in the Washington, Chicago and New York Offices of said Authority which contains correspondence, audit information or investigative material for 1963, to separate the 1963 documents, and then to make a detailed review of each such document to determine whether it contains material within paragraph 11. After the documents within the scope of paragraph 11 are located, it would be necessary to review each one in detail to determine whether it contains information prohibited from disclosure by section 8 or otherwise privileged from disclosure in this proceeding. It is estimated that locating and reviewing these documents would require about 250 manhours of work at a cost to the Government of \$800.

(g) The reports of investigations made by the Commodity Exchange Authority, called for by paragraphs 17, 18 and 19 of the schedule, are voluminous. Locating these reports would not present a major problem but each page of the reports would have to be reviewed in detail to determine whether it contains material prohibited from disclosure by section 8 or otherwise deem privileged from disclosure in this proceeding. It is estimated that this would require at least 200 manhours of work at a cost to the Government of \$1900.

(h) Locating and reviewing the documents in the files of the Commodity Exchange Authority which are apparently within the scope of paragraphs 4, 8, 9, 10 and 13 and have not already been made available to the petitioner, would require an estimated 34 manhours of work and would cost the Authority about \$200.

(1) Therefore it is estimated that the total expenditure of time by the Authority in making available for inspection by the petitioner the documents within its files which have not heretofore been made available to him would be 724 manhours and that the cost to the Authority would be \$3500. No funds have been included in the budget of the Authority for such work, and the performance of the work would require the diversion of the services of employees of the Department from their regular duties which urgently need their attention and thereby interfere with administration of the Act and other functions of the Department. The above estimate does not include costs that would be incurred in the other agencies of the Department mentioned above.

/s/ Alex C. Caldwell  
Alex C. Caldwell  
Administrator  
Commodity Exchange Authority

Subscribed and sworn to before me at Washington, D. C., this  
5th day of January, 1966.

/s/ Galen Yates  
Notary Public

[CAPTIONED OMITTED]

Affidavit  
(Filed January 10, 1966)

Washington  
District of Columbia } ss:

Lester P. Condon, being duly sworn, deposes and says:

1. I am the Inspector General of the United States Department of Agriculture and as such am generally responsible for the conduct of investigations made by the Office of the Inspector General (O.I.G.) and have custody of the records of said office on behalf of the Secretary of Agriculture.

2. This Office is the major investigative agency within the Department of Agriculture. It is generally responsible for conducting investigations to determine compliance with certain laws administered by the Department and in addition it makes investigations of other matters upon referral by the Office of the Secretary of Agriculture or various administrative agencies within the Department. For example, the Office has conducted investigations to determine whether certain persons violated the Commodity Exchange Act; to determine the accuracy of shipping data furnished by certain firms to the Commodity Credit Corporation in connection with exports by such firms of various commodities under the Agricultural Trade Development and Assistance Act of 1954 (7 U.S.C. 1691 et seq.; Public Law 480, 83rd Congress) and other export programs; to determine

whether certain companies submitted false claims to said Corporation in vegetable oil transactions under Public Law 480; to determine whether certain persons transported interstate and exported nonfederally inspected rendered pork fat contrary to the Meat Inspection Act (21 U.S.C. 71 et seq.); and to ascertain whether certain persons were eligible to participate in programs financed by the Commodity Credit Corporation. This Office also performs internal audits to determine whether the various agencies of the Department are performing their functions effectively in accordance with laws, plans, policies, and procedures.

3. The investigations are primarily concerned with developing evidence for use in criminal, civil or other legal actions. A large number of investigations result in criminal informations or indictments. The activities of this Office are similar in many respects to those of other investigative agencies of the Government such as the Federal Bureau of Investigation and a close liaison is maintained with such other agencies for the exchange of information. Information received from agencies such as the FBI and Internal Revenue Service becomes an integral part of the files of the Office of the Inspector General.

4. Investigative inquiries require interviews with persons in all segments of society and examinations of books and records of individuals and companies doing business with the

Department, and of other persons. Information is received from many different sources, including Congressional sources, other investigative arms of the Government, persons doing business with the Department, confidential informants, and other members of the public. Much of the information is received in confidence. It involves personnel practices and actions of those inside and outside the Federal Government which bear on personal integrity, reputation, and financial background. Much of the information received relates to trade secrets such as bid prices, commercial practices, and financial condition. Such information is given to the Office of the Inspector General in the belief that its use and distribution will be restricted. Disclosure of such information or the sources thereof in this proceeding could seriously impair the effectiveness of this Office in obtaining evidence.

5. There is no general authority for this Office to subpoena witnesses or demand access to records in the course of its investigations and whether such authority exists in any particular case depends upon the provisions of the statute under which the investigation is made or upon the terms of any applicable contract with the person investigated. The Office conducts investigations of matters which arise under many statutes which do not provide for subpoenas or access to records, and which do not involve any contract provision requiring the person investigated to afford access to his



records. In such cases the success of the investigations depends upon voluntary cooperation of the persons interviewed.

6. If the sources of information furnished to this Office are not kept confidential it will be much more difficult for us to obtain evidence in future cases because informants will hesitate to risk the possibility of institution of court actions for slander or economic reprisals. It would be highly impracticable in some cases to eliminate from the investigation reports all information disclosing the identity of the persons interviewed since the subject matter of the interviews in such cases in itself identifies the informants.

7. Further, revealing the facts developed by such investigations may prejudice pending or prospective court cases or administrative actions. Some of the matters investigated by this Office, which are within the apparent scope of the schedule attached to the Petition in this proceeding, are pending in the U.S. Department of Justice where they are under consideration for possible institution of civil or criminal action, and some are being considered within the Department of Agriculture to determine whether administrative proceedings should be instituted.

8. The reports of the investigations reflect the evaluation of the facts by the investigators. The files also contain documents including recommendations to the Office of the General Counsel by the agency administering the law involved

as to the legal action to be taken with respect to certain matters, instructions as to the techniques and scope of investigations, and other expressions of opinion and recommendations between officials within the Department or between this Department and the Department of Justice. A free and candid exchange of views between the Government personnel involved with respect to the subject matter of investigations would be impeded in the future if such evaluations, opinions and recommendations are subject to disclosure in proceedings such as this and the enforcement of the laws administered by the Department and other functions of the Department would be impaired. This also would be true of internal audit reports with respect to internal agency operations.

9. The schedule is phrased in very broad and in many respects vague terms. Several paragraphs of the schedule would appear to include classes of documents which may be found in the files of this Office as well as several other agencies of this Department, e.g., Commodity Exchange Authority, Agricultural Stabilization and Conservation Service, Consumer and Marketing Service, and Foreign Agricultural Service.

10. Paragraphs 10, 18 and 19 of the schedule appear to be the principal ones involving records of this Office. Our files contain voluminous documents, communications and reports dealing with extensive investigations, for the purposes

outlined in paragraph 3 above, of the activities of Allied Crude Vegetable Oil Refining Corporation and its officers, employees, and many affiliated companies. These investigations were primarily made pursuant to requests from the Office of the Secretary, various agencies within the Department, congressional committees, or other governmental agencies. Since 1960 we have opened numerous cases concerning such matters and have issued scores of investigation reports relating thereto. Most of these were opened and investigated since November 1963.

In connection with these investigations, we have developed massive amounts of backup material, workpapers, interoffice communications and correspondence with the subject of investigations, their attorneys, the Department of Justice, Internal Revenue Service, Members of Congress, Congressional Committees, and others. Approximately 30 man-years have been involved in OIG investigations and audits relating to matters covered by the schedule. These documents are contained in individual case files and general files at Headquarters, Washington, and in most of the seven Regional Offices of OIG located in New York City, New York; San Francisco, California; Temple, Texas; Kansas City, Missouri; Chicago, Illinois; Atlanta, Georgia; and Hyattsville, Maryland. The New York Office alone has many file drawers and cartons of documents relating to these investigations, and additional documents are

located in Washington, D. C. and elsewhere with respect to the matters investigated.

11. Paragraphs 10 and 11 of the schedule are also in such broad terms as to require a search of many of our files for any material within the scope of these paragraphs.

12. After the material is located it would have to be reviewed in detail - page by page - to determine whether it discloses separately any information as to business transactions, trade secrets, or names of customers of any persons, which was obtained under the Commodity Exchange Act and is prohibited from disclosure by section 8 of that Act, or any information otherwise privileged. Documents pertaining to specific persons named in the schedule are not in segregated files but are intermingled throughout the file system. To locate these documents and other case file materials, index files must be consulted, and the appropriate files identified and located. To identify, locate, review, eliminate duplicates of, itemize and correlate on a nationwide basis the documents called for by the schedule would be extremely time-consuming and onerous.

13. The review of documents to select material coming within the purview of the schedule could only be accomplished by a small number of persons who have an overall knowledge of the complex issues and interrelationships between the many investigations and audits conducted. It is estimated that it

would require a minimum of three months to locate and review all the documents within the scope of the schedule and to identify the material contained therein which is prohibited from disclosure by section 8 of the Commodity Exchange Act or otherwise privileged, with an expenditure of time equivalent to one man-year, costing between 10 and 15 thousand dollars. The assignment of a large number of people to the task of review and selection of documents would not be possible due to the high priority of current work assignments, heavy backlog of work which is presently requiring long hours of overtime, and unfamiliarity with the Allied Crude Vegetable Oil Refining Corporation matter. Assignment of those familiar with this matter would impose a serious burden on the Office due to their relatively high positions of responsibility in the organization and the fact that they would not be available to supervise the day-to-day conduct of other investigations or audits.

/s/ Lester P. Condon  
Lester P. Condon  
Inspector General

Suscribed and sworn to beofre me at Washington, D. C.  
this 30th day of December, 1965.

/s/  
Notary Public

[CAPTIONED OMITTED]

AFFIDAVIT  
(Filed January 20, 1966)

STATE OF NEW YORK     )  
                              : ss:  
COUNTY OF NEW YORK    )

CARL D. IOBELL, being duly sworn, deposes and says:

1. I am associated with the firm of Weil, Gotshal & Manges, Special Counsel for the Trustee in Bankruptcy in the Estate of Ira Haupt & Co., Bankrupt; and am personally familiar with the facts set forth herein and with the steps taken by this firm on behalf of the Trustee in Bankruptcy, all as described below.

2. This affidavit is submitted on behalf of Charles Seligson, Trustee in Bankruptcy of Ira Haupt & Co. (Hereinafter referred to as the "Trustee"), in opposition to the motion of Hon. Orville L. Freeman, Secretary of Agriculture, to quash or modify the subpoena duces tecum served upon him by the Trustee.

3. Ira Haupt & Co., the instant bankrupt, was so adjudged by a decree entered on June 26, 1964 by the Hon. Edward J. Ryan, Referee in Bankruptcy, United States District Court, Southern District of New York.

4. On October 6, 1964, Charles Seligson was appointed Trustee of the bankrupt estate, and thereafter qualified. Said appointment was confirmed by Judge Murphy on



March 10, 1965. 240 F. Supp. 10 (S.D.N.Y. 1965).

5. Prior to the appointment of the Trustee, a number of law suits had been commenced on behalf of the bankrupt against various persons, firms and corporations. One of these actions related to injuries which the bankrupt had allegedly sustained as a result of events occurring on the commodity futures markets. Present accounting records indicate that Haupt's losses arising out of trading in cottonseed oil and soybean oil futures during November 1963 exceeded \$20 million and that such losses were plainly a substantial factor in causing Haupt's bankruptcy. The aforementioned suit is in the nature of a derivative proceeding and is still pending with the bankrupt as a nominal defendant.

6. At a hearing held on February 4, 1965, in the Ira Haupt & Co. bankruptcy proceeding, Cause No. 64B 259, the Trustee advised the Referee in Bankruptcy that despite his continuing investigation into the acts, conduct and property of the bankrupt being made by his general counsel and special counsel, he was not in possession of sufficient facts to make an informed judgment as to all pending lawsuits in which the bankrupt was involved. He noted that prior to applying for intervention or substitution in any action which had been commenced on behalf of the bankrupt, he believed it necessary for a complete and total investigation to be made of the facts and circumstances underlying any and all causes of action

in order to determine the merits of pending and potential actions which were or could be brought by him as Trustee. Application was then made by the Trustee for the appointment of the firm of Weil, Gotshal & Manges to represent him as Trustee in an investigation of the facts and circumstances of proceedings which had been instituted on behalf of the bankrupt.

7. On March 17, 1965, Weil, Gotshal & Manges was appointed as Special Counsel to investigate the facts and circumstances relative to these lawsuits, and to advise the Trustee as to the further prosecution thereof. A copy of the appointment order is annexed hereto as Exhibit A.

8. For the court's information, there is set forth in this affidavit the history of the investigation currently being conducted by Weil, Gotshal & Manges, said Trustee's Special Counsel, and a summary of some of the testimony given in examinations conducted by Special Counsel pursuant to Section 21(a) of the Bankruptcy Act to the extent that such testimony relates to or bears upon questions presented by the aforesaid motion of the Secretary of Agriculture.

9. The investigation of such facts and circumstances, and in particular the facts and circumstances surrounding trading in cottonseed oil and soybean oil commenced immediately thereafter. Our firm has, since May 18, 1965, been conducting extensive examinations under Section 21(a) of the Bankruptcy

Act. To date, thousands of pages of transcript have been recorded in the course of these examinations, and further examinations are currently scheduled. A tabulation of the examinations conducted in New York follows.

<u>Date</u>	<u>Witness</u>	<u>Pages</u>
May 18, 1965	David L. Boyer (New York Produce Exchange Clearing Association)	3232-3402(a)
June 4, 1965	David L. Boyer	3713-3853
June 11, 1965	David L. Boyer	3869-4016(a)
June 16, 1965	David L. Boyer	2 - 47
June 16, 1965	Perry E. Moore (New York Produce Exchange Clearing Association)	48 122
June 17, 1965	Perry E. Moore	4219-4273(a)
June 17, 1965	David L. Boyer	4274-4307
June 23, 1965	James Comenzo (New York Produce Exchange)	4676-4685
June 23, 1965	John Fontana (New York Produce Exchange)	4686-4688
June 30, 1965	James Comenzo	4690-4811
July 2, 1965	John Fontana	4813-4946
July 2, 1965	Milton Goldfogle (New York Produce Exchange)	4947-5100
July 9, 1965	James Comenzo	5101-5235
July 9, 1965	Milton Goldfogle	5236-5348

<u>Date</u>	<u>Witness</u>	<u>Pages</u>
October 21, 1965	L. Hudson Leathers (New York Produce Exchange Clearing Association)	5569-5690
October 22, 1965	L. Hudson Leathers	34 - 87
November 18, 1965	L. Hudson Leathers	1 - 125
November 19, 1965	Charles B. Vose (New York Produce Exchange Clearing Association)	125-131(a)
December 9, 1965	Harry B. Anderson (New York Produce Exchange)	1 - 125
December 13, 1965	Harry B. Anderson	1 - 118
December 20, 1965	Harry B. Anderson	207-388
December 27, 1965	Donald V. MacDonald (New York Produce Exchange)	339-693(a)

10. In addition to the aforementioned Section 21(a) examinations, additional examinations were held in Chicago, Illinois before the Hon. Elmer P. Schaefer, Referee in Bankruptcy. While these examinations were primarily focused upon soybean oil trading on the Chicago Board of Trade, they provided valuable insights into cottonseed oil trading on the New York Produce Exchange. Since the two crops are interrelated both as to futures prices and as to commercial uses, and since Allied Crude Vegetable Oil Refining Corporation . . . and Anthony DeAngelis held dominant positions in both commodities, examination into either market is of the utmost

importance with respect to insights into the other market.

The following examinations were held in Chicago:

<u>Date</u>	<u>Witness</u>	<u>Pages</u>
September 21, 1965	Sidney C. Hamper (attorney at law and Member of the Chicago Board of Trade)	78 - 124
September 21, 1965	Ford M. Ferguson (Grain commission merchant and Member of the Chicago Board of Trade)	125 - 224
September 22, 1965	Robert Raclin (General partner of Paine, Webber, Jackson & Curtis)	231 - 356
September 22, 1965	Ford M. Ferguson	358 - 407
September 23, 1965	Gus F. Klein (Vice-President of Lowell Hoit & Co. and Member of the Chicago Board of Trade)	527 - 529

11. The instant subpoena was served upon the Hon. Orville L. Freeman, Secretary of Agriculture, by the Trustee pursuant to Section 21(a) of the Bankruptcy Act, after due application to the Referee in Bankruptcy and upon an Order for Examination of said Hon. Orville L. Freeman entered by the Hon. John A. Bresnahan, Referee in Bankruptcy, on October 21, 1965. The documents called for by the subpoena are, principally, reports of positions and trades filed daily with the Commodity Exchange Authority by traders, futures commission merchants and clearing members of contract markets

pursuant to the Commodity Exchange Act, and investigative reports of the Authority relating to trading in the cottonseed oil and soybean oil futures markets and the event leading to and culminating in the instant bankruptcy. The records, all of which are in the possession, custody or control of the Department of Agriculture, are essential to a determination by the Trustee of the claims that may be vested in the bankrupt as a result of the events occurring in the aforementioned commodity markets.

12. Testimony obtained from officials and members of the New York Produce Exchange during the above-mentioned examinations indicates that long positions had never before been accumulated in the manner in which they were accumulated during 1963 (TR. Goldfogle, p. 5076); that the activity during 1963 was the "most unusual" he could recall (TR. Goldfogle p. 5086); that the "texture" of the market during 1963 was different than ever before in terms of volume, daily trading, ex-pits, deliveries and the opening of new warehousing capacity, all in the sense that there was "more of it" (TR. Comenzo, p. 5183); that the concentration of positions during October and November 1963 was "immense" and "unique" (Tr. Anderson 12/13/65, p. 23); that there was an "insane" accumulation of positions by a single interest (TR. Anderson, 12/13/65, pp. 25-26); that what had happened during October and November 1963 was a manipulation (TR. Anderson, 12/13/65, pp. 26-27); and that the accumulation was "artificial" and



tended to make the price higher than it might otherwise have been (TR. Anderson, 12/13/65, p. 27).

13. The above quotes merely constitute a representative sampling of the record in these respects, and we do not wish to burden the Court with a detailed recital of everything that is in the thousands of pages of transcript and in our own internal memoranda dealing with the numerous interviews we have conducted. Suffice it to say that the foregoing sampling demonstrates the year 1963 to be the most "unique" year, cottonseed oil and soybean oil ever experienced, capped by the instant bankruptcy and the collapse of numerous other firms.

14. Testimony obtained during the above-mentioned 21(a) examinations also reveals the role played by the Commodity Exchange Authority as follows: that the Produce Exchange did not pass rules affecting or regulating trading in commodities without first clearing them with the Commodity Exchange Authority (TR. Anderson, 12/9/65, p. 97); that the Commodity Exchange Authority was in a position during the entire period to determine whether traders were truly hedgers or speculators (TR. Anderson, 1/13/65, p. 6); that a director of the Produce Exchange believed the Commodity Exchange Authority had failed to discharge its responsibility in the DeAngelis affair since they had the positions of all persons trading in cottonseed oil on a daily basis and never notified the exchange of the

build-up of the positions (Tr. Anderson, 12/13/65, p. 22); that the Commodity Exchange Authority had communicated with officials of the Produce Exchange with respect to ex-pit transactions (TR. Anderson, 12/13/65, p. 52); that as early as August or September of 1963 an official of the Produce Exchange expressed his concern over the market to an official of the Commodity Exchange Authority who indicated that the Authority was also concerned and was watching the situation (TR. Anderson, 12/13/65, pp. 112-113); that the Commodity Exchange Authority furnished the Produce Exchange with information disclosing the positions in cottonseed oil on November 14, 1963 (TR. Anderson, 12/20/65, pp. 251-252); that it refused to furnish similar information prior thereto although requested by the exchange (TR. MacDonald, pp. 527-528); that the administrator of the Commodity Exchange Authority had at least three conversations with officials of the Produce Exchange on November 14, 15 and 18, 1963, and that each time the Authority recommended that the market in cottonseed oil be closed (TR. Anderson, 12/20/65, pp. 257-259, Tr. MacDonald, pp. 670-673); and that the administrator of the Authority was kept advised as to actions taken by the Produce Exchange during the crucial period (TR. Anderson, 12/20/65, pp. 291-292); that the administrator of the Authority and the Under Secretary of Agriculture were concerned about a corner on the exchange and what action would be taken by the exchange (Tr.

MacDonald, pp. 670-673); and that Commodity Exchange Authority personnel were at Allied's offices during the week of November 11, 1965 (TR. Anderson, 12/20/65, p. 322).

15. Finally, documents produced pursuant to subpoenas issued by the Trustee indicate that the head of the Foreign Agricultural Service, who administered the PL 480 export program in which Allied participated, met on numerous occasions with personnel of other companies also engaged in exporting under the PL 480 program in an attempt to solicit the cooperation of those companies to stop dealing with Allied in purchases of oil and financing.

16. I respectfully submit that four things, at least, appear from the foregoing facts:

(a) that the instant bankruptcy was intertwined with events on the cottonseed oil and soybean oil futures markets;

(b) that those markets were of a nature, at least in 1963, never before experienced, whether this be characterized as "unusual", "unique" or "insane";

(c) that the Department of Agriculture's records on trading will disclose who, specifically, profited or lost during this "insane" period, and will further indicate whether all responsibilities in conjunction with the regulation of those markets were properly discharged; and

(d) that the Department of Agriculture was intimately involved in the whole affair.

/s/ Carl D. Lobell  
Carl D. Lobell

Sworn to before me this  
19th day of January, 1966.

/s/ Sarah Shulman  
Notary Public

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

-----X  
:  
IN THE MATTER OF :  
:  
IRA HAUPT & CO., a Limited : IN BANKRUPTCY  
Partnership, : NO. 70-65  
:  
Bankrupt. :  
:  
-----X

Room 2104, U. S. Court House,  
Washington, D. C.,  
Thursday, January 20, 1966.

The above-entitled matter came on for hearing on motion  
of Secretary of Agriculture to quash or modify the subpoena  
duces tecum served on the Secretary, before HONORABLE JOHN A.  
BRESNAHAN, Referee in Bankruptcy, at 10:02 a. m.

APPEARANCES:

Special counsel on behalf of the Trustee:

Carl D. Lobell, Esq.  
Eliot H. Lumbar, Esq.  
Michael A. Schuchat

On behalf of the Petitioner, U. S. Department of  
Agriculture:

Fred W. Drogula, Esq., Civil Division,  
Department of Justice.

Robert Franks, Esq., and Lotus Therkelsen, Esq.,  
Office of Inspector General, U. S. Department of  
Agriculture.

ALSO PRESENT:

Mr. Alex C. Caldwell, Administrator of the  
Commodity Exchange Authority

Mr. Richard W. Fitch, Jr.

Mr. B. F. Robinson, Office of Inspector General,  
U. S. Department of Agriculture

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P R O C E E D I N G S

THE REFEREE: This is in the matter of Ira Haupt & Co., Bankrupt, Bankruptcy No. 70-65, an ancillary proceeding in this jurisdiction, and this is the time that has been set for the taking of the 21(a) examination of the Honorable Orville H. Freeman. Subsequently, however, a motion to quash has been filed or, alternatively, to modify the subpoena duces tecum; and there has been opposition filed to that.

So I suppose we will proceed with that matter this morning.

Will you identify yourselves, please, for the Reporter.

MR. DROGULA: Thank you, sir. My name is Fred Drogula. I am counsel for The Secretary of Agriculture this morning. I am an attorney from the Department of Justice. Seated with me at counsel table are Miss Lotus Therkelsen and Mr. Robert Franks, attorneys from the Office of the General Counsel at the Department of Agriculture.

MR. SCHUCHAT: If Your Honor please, I am Michael A. Schuchat, counsel for the Trustee. This is Mr. Carl D. Lobell from the firm of Weil, Gotshal & Manges, a member of the Bar of the Court of Appeals of New York, who will argue the matter this morning; and Mr. Eliot H. Lombard of the firm of Townsend & Lewis, who is also special counsel for the

Trustee.

THE REFEREE: Are these gentlemen just observers?

MR. DROGULA: That is correct. If you would like me to introduce them, I would be happy to.

THE REFEREE: It might be well for the record.

MR. DROGULA: Seated in the back of this courtroom is Mr. Alex C. Caldwell, Administrator of the Commodity Exchange Authority of the United States Department of Agriculture. And we have Mr. Robinson and Mr. Fitch, who are here today representing the Office of the Inspector General of the United States Department of Agriculture.

THE REFEREE: Thank you. You may proceed.

MR. DROGULA: Thank you, sir. Would you prefer that I stand?

THE REFEREE: You can make yourself comfortable.

MR. DROGULA: Thank you very much.

The matter before the Court today is the motion to quash or to modify the subpoena duces tecum which was served upon the Secretary of Agriculture on October 22, 1965.

As the Court is aware, this subpoena was predicated upon order for the examination of Secretary Freeman which was entered by this Court previous to that date. That, in turn, the order for the examination of Secretary Freeman, was entered on the petition which at that time was ex parte of

Charles Seligson, who is the Trustee for Ira Haupt & Co., a bankrupt, in bankruptcy proceedings pending in the United States District Court for the Southern District of New York.

The background of this matter has been set out in great length in the memorandum of authorities which we have filed as well as in the affidavits of Mr. Caldwell and Mr. Condon. Also, further background material has been furnished in the opposition to our motion filed by the Trustee. I will not go into it in depth except to say that the Trustee, who I will hereafter refer to as the petitioner, is attempting to elicit from the Department of Agriculture certain information which he says will enable him to make a judgment as to whether or not he should assume the prosecution of litigation which is now pending in New York. He represents that it is necessary that he determine whether a cause of action does indeed exist before he can elect as to whether to assume the prosecution of this action. And he further alleges that the most practical and the most feasible way of obtaining this information is from the files of the Department of Agriculture.

We in turn have based our opposition to this subpoena and have moved to reduce it upon the ground that it is burdensome and oppressive, that it seeks confidential documents, that it is extremely broad, and that it seeks

production of documents which are presently in use both by the Department of Agriculture and by the Department of Justice in current investigations of violation of Federal law.

Now, the subpoena on its face is too broad. It is a long, lengthy schedule of documents contained upon nine pages divided into nineteen paragraphs, cast in very sweeping language, asking virtually, and I do not make this statement lightly, for every document in the possession of the Department of Agriculture which relates to the Anthony DeAngelis matter. I am sure the Trustee will go into the background of the DeAngelis matter at length, so I will not dwell upon it. I am sure that we all know that those were the circumstances under which Ira Haupt & Co., who handled the account for DeAngelis, lost large sums of money in the commodity market.

However, the subpoena under the rules announced in this District is too broad. Merely looking at the subpoena, we can see that it is not cast in terms of seeking any specific documents. It does not really seek any particular category of documents, except within broad confines of period of years in broad outline of various documents.

Now, Judge Keech, speaking for this court, said in Continental Distilling Company against Humphrey, any subpoena which is cast in this language is unreasonable and oppressive and too broad on its face.

Now, the subpoena which Judge Keech quashed in that case is set out in the margin in the Continental Distillery case. I will not read it because it is quite long; but just a cursory examination of that subpoena would demonstrate clearly that it is not ten percent as broad as the subpoena which is attempted in this proceeding.

In the first three paragraphs of the nineteen paragraphs of this subpoena, it would require the production of more than 313,000 documents. Now, that is only the first three paragraphs. The remaining sixteen paragraphs call for untold quantities of other documents which, because we do not wish to even begin on this long journey, we have not accurately counted to this point. But I think it can safely be assumed that the total number of documents which are involved here probably go close to half a million documents.

Now, in this circumstance, we think that without some further particularity on the part of the Trustee that this subpoena should be quashed. I know that the theory of the Trustee appears to be that the proper practice is to file a broadside subpoena asking for unlimited numbers of documents and then thereafter say, well, perhaps this is somewhat unrealistic, perhaps this is too broad, let us now negotiate in an attempt to trim it down and weed out the documents which we really do not need or really may not need.

However, as Judge Keech said in the Continental Distillery Corporation case, that is not the proper procedure. If a broad subpoena is filed it should be quashed, and the remedy for the person seeking the documents is to come back in, if he so elects, with a realistic document and begin pruning from there. And it is this course which we suggest should be followed in this case.

Now, in the brief which we received from the Trustee yesterday, which, I must say, we have not had an opportunity to examine at length, there seems to be no objection or no dispute to the fact that this is an extremely broad subpoena. Rather, the defense is cast upon the grounds that it is justified in view of the seriousness of the enterprise of the proceedings which they are trying to investigate.

However, in view of the competing interests, and perhaps that is the most crucial point which we will talk about today, we feel that the subpoena should be quashed. Certainly the Government is not insensible to the interests which the Trustee represents here this morning. We are aware that the Ira Haupt Company lost a large sum of money in the commodity markets. We are also aware that the creditors, who after all are the ones who will really benefit by any recovery in this proceeding, have a legitimate interest in attempting to



recover as much as possible on their investments and their losses in this case. However, we want to stress that the interests of these creditors, be they persons, firms, or corporations, as legitimate as those interests may be, are private interests. We do not feel, although much is said in the opposition of the Trustee, that they are representing public interests, that they are in fact doing so. If they allege that they are seeking to vindicate the operation of the commodity exchange market, if they feel that they are attempting to vindicate the tradings and the dealings on those markets, that is not the proper function for them to exercise. The Government, through the Commodity Exchange Authority, is the personnel and the proper authority to do this.

Therefore, we feel that in making this evaluation, and, after all, it is a balance that must be struck here between the interests of the Trustee in obtaining these documents and the interests of the Government in maintaining them free from disclosure, contrary to that interest is the interest which the Government has alleged here.

Now, these are indeed, and truly the public interests. These are the interests in not having wholesale investigations of the Government files.

Now, we have cited in our brief a case from the Southern District of New York, Public Administrator of the

Courts of New York against Rogers, in which a subpoena, which again was much narrower than what we are confronted with here, was attempted against the files of the Office of Alien Property of the Department of Justice. It was, as I say, a broad subpoena, calling for all documents relating to certain categories, not nearly so broad as we have here, but District Judge Dawson denied it with words which I think bears directly upon this proceeding. He said:

"This motion does not itemize the documents to be examined, but seeks rather to have a general roving commission to go through all the records of the Office of Alien Property to find out what statements, affidavits, transcripts and other evidence it may have."

Now, we feel here, on the basis of the showing that has been made, that that is exactly what the Trustee is attempting to do. They want a roving commission generally to go through all the files of the Department of Agriculture.

Now, there is an important public policy consideration against this being done. I am certain that you are familiar with the Kaiser Aluminum case and many other cases which we have cited in which they have said internal Government documents must be maintained in confidence if they are to be at all encouraged in the proper functioning of the Government. If Federal departments are to perform the

functions they are entrusted with by Congress they have to do them without being in the limelight and scrutiny of everyone who may, for one purpose or another, want to examine them. Beyond this, there are other interests of a public nature. The subpoena, particularly in paragraphs 17, 18, and 19, seeks production of investigation reports. These are reports made primarily by the Commodity Exchange Authority and by the Office of the Inspector General into matters which the Trustee is apparently trying to investigate. Now, these investigation reports were made by Government investigators. They are based in part upon information supplied to them in confidence by people who they interviewed. There was no compulsion upon these people to furnish information to the Government investigators. The Government investigators must depend upon their willingness to supply this information voluntarily; and if these people find out that the information they supplied, which sometimes is no more than speculation or surmise, if these people feel that this type of information is going to become subject to public disclosure through compulsory subpoena process at a later time, then it is impossible to conclude that the efficient operation of the Office of the Inspector General and the Commodity Exchange Authority could smoothly function. So on this basis we have these important policy considerations.

I might mention that the very most recent pronouncement from this court is, of course, the City of Burlington against Westinghouse case in which only last October Judge Sirica refused to allow the Westinghouse Corporation access to Federal Bureau of Investigation investigation reports. He said exactly on the policy I have announced, that we must encourage cooperation with these investigating agencies. After all, they are out trying to uncover violations of Federal law, and we cannot allow them to function if they must do so with everyone looking over their shoulder.

So he quashed the subpoena completely to the extent that it attempted to gain investigation reports. This is a further indication of these policy considerations.

Also, as I mentioned, many of these documents are presently being used for investigation of possible violations of Federal law. The Department of Justice presently has in its possession many investigation reports prepared by the Office of the Inspector General, and they are using these investigation reports as a factual basis to find out whether or not any further violations of Federal law exist; and we all know that there are criminal prosecutions pending growing out of the DeAngelis matter. They are pending in other districts. Now, there may be, although I am not in a position to say emphatically on this point one way or another, other such

prosecutions. We cannot at this juncture say that the Government has completed its use of these investigation reports; and as Judge Holtzoff in a very well-rounded opinion wrote in the Capitol Vending case against Bobby Baker, there is a well recognized privilege in the Government which is short of executive privilege. And I might say we have not at this juncture, as the record indicates, made a formal claim of executive privilege. But there is a privilege which exists in the Government that documents which it is using for possible investigations of Federal law are not subject to production.

Now this case, of course, is reported in 35 F.R.D., page 510. Now, in my brief review of the opposition of the Trustees, I have not found any response to this argument. It may be there and perhaps I didn't see it, but I think it is clear that to the extent that the subpoena seeks this type of document it must be quashed.

There are, however, further public interests involved. We have pointed out in our memorandum that many of the investigation reports which are sought by the subpoena were prepared by the Commodity Exchange Authority for the sole purpose or for the principal purpose of referring them to the Department of Justice or to other agencies of the Department of Agriculture for legal proceedings. Now, in this

circumstance, we think it is clear that at least without a further particularization of documents on the part of the Trustee we will be unable to determine that these are the work product of the attorneys. I don't think there is any question but that the attorneys of the Department of Justice are just as much eligible to claim a work product exemption as attorneys in private practice. These are very important policy considerations.

Now, at this point it is impossible to put our finger on each and every document and say this is covered by the work product privilege, this is covered by the privilege that we are continuing investigations of violations of Federal law, this is covered by the privilege against disclosing confidential documents, simply because of the sweeping and broadside demand of this subpoena. However, if in the future after this subpoena is quashed, and we are, of course, hopeful that it will be quashed, the Trustee files another subpoena which would particularize with detail the documents specifically that it was seeking, we would be in a position to base our claim of privilege as to specific documents.

Now, I would like to point out that, although the Trustee claims that his subpoena is not that broad, no where in the opposition, again, according to my brief reading, is there a single authority cited which sustained a subpoena



any where near the breadth of the present one. The only case which comes remotely close to this subpoena is, of course, the Westinghouse versus City of Burlington case which was decided last year in our Court of Appeals. But in that case we had much different facts and we had much different circumstances. In that case, as I am sure you will recall, there were many electric companies who were being sued by persons who felt that there was a conspiracy among the electrical companies or at least that they had somehow conspired to violate the anti-trust laws in pricing policies. There was a four year statute of limitations involved which would have prevented the plaintiffs in those cases from claiming damages beyond the four year period of limitations. However, there is also a rule which has been adopted in this circuit that if defendants in antitrust proceedings attempt to conceal their conspiracy that this has the effect of tolling the running of the statute of limitations. Therefore, it was incumbent upon the electrical companies, if they could do so, to demonstrate that the plaintiffs in that proceeding had knowledge of that conspiracy prior to the time that they were involved with there. If they could show that knowledge, then the rule as to concealment of the conspiracy would evaporate and that defense would be available.

on that basis a subpoena duces tecum was issued

in which the parties sought to find out whether the plaintiffs had filed complaints with the Department of Justice. If they had filed these complaints, of course, that could show knowledge or at least constructive knowledge on their part. Now, this was a very broad case. It had implications across the country. There were hundreds of suits filed growing out of these anti-trust violations. In fact, the proceeding was so broad and so many judges were involved that meetings were held around the country by these judges to consult on the proper means of handling this litigation, and the Judicial Conference created a special committee to uniformly handle the problems of discovery. And our Court of Appeals in that case, although not ordering production of any documents, said that the case should be remanded to the District Court to determine whether or not the subpoena was so burdensome and so oppressive that it could not be granted on even a limited basis. But there, as I say, even that subpoena was much less broad than the one we are involved with here.

Now, an important point in this case and one which we haven't mentioned up until this point is that there are alternative means whereby the Trustee can obtain the information he now seeks from the Secretary of Agriculture. I say this is very important because of the primary question here, which is to strike a balance between the private

interests of the Trustee as opposed to the public interests of the Government. The cases which we have cited in our memorandum, and I won't go through them all again, stand for the proposition that where a party has access to documents from alternative means there is no need to burden, annoy, or oppress a disinterested witness with the production of all of these documents. Now, there is pending litigation between certain partners of Ira Haupt against defendants who they claim occasioned the losses of the Bankrupt on the commodity exchanges. Now, I would assume that, since they have been named as defendants, they are identified there with reasonable particularity. Now, it seems only reasonable that before the Government is burdened with an unlimited demand for discovery that an effort should be made to depose these individuals and obtain from them all of this information from their own files. Mr. Caldwell's affidavit contains a paragraph saying that certain of these traders who are suspected in general terms of having occasioned the Bankrupt's losses have stated that they recognize that their files are available for this type of examination and that one such individual has volunteered information to the Trustee.

Now, we do not feel that on this basis, in view of the important public policy considerations involved, that there is any need for a showdown on the questions of

the confidentiality of Government documents or the importance of the Government records to the Government requiring any sort of a showdown on that until the Trustee has demonstrated to this court that it has exhausted these alternative means. Now, the Trustee, of course, cannot deny that these alternative means are available. What he says, however, is that it would be much more inconvenient and much more costly and much less efficient from their standpoint to obtain the documents from those sources.

In the first sentence of the opposition which they have filed they have characterized our present motion as an attempt "to ring down a curtain of silence to mask one of the greatest disasters ever to occur on the commodity futures markets." Well, of course, this just isn't so. I am certain that the Trustee is not prepared to represent here today that if this subpoena is quashed that he will immediately cease all efforts to obtain the information he needs, that he will make no efforts to obtain these documents from other sources, and that all of the litigants in New York will immediately come to terms and that there will be no further proceedings. Of course not. If this subpoena is quashed, the Trustee will do what he should have done in the first place, and that is to go directly to the files of the persons who are accused or suspected of having occasioned

these losses and get this information from them. On that basis it makes no sense at all to say that these documents must be produced from the Government or we will ring down a curtain of silence.

Now, again on this, the Trustee parades a list of horrors, that if it is required to do this, it will have to subpoena thousands of firms, thousands of persons; it will have to go out in ever-expanding circles, getting first the names of the brokers, then the names of the customers, and so forth. However, they predicate this argument on the idea that, in order to make a judgment upon which the Trustee can proceed, he must have the reports of all of the traders on the commodity markets during the period in question. I am certain there are huge numbers of traders that would be involved. But it is admitted that the vast majority of these traders are wholly innocent of any wrongdoing, are wholly innocent of in any way of affecting the Bankrupt or causing the Bankrupt any damage whatsoever. They are attempting in the first three paragraphs of this subpoena to obtain these reports from the Government. They want all of the reports filed by all of the traders on the commodity exchanges for a four year period, even though they know that the vast majority of the people who file these reports

are completely innocent of any wrongdoing.

Now, it is the Government's position that production of these reports as to the people who have absolutely no direct connection with this proceeding is just unthinkable. It is unthinkable that they should have their business transactions, their trade secrets, and all of this other information which the law required them to file with the Department of Agriculture, but which under Section 8 of the Commodity Exchange Act they filed with the understanding and the supposed knowledge that this information would be maintained in confidence, that these people should have all of their secrets exposed simply, I say, to serve the interests of the Trustee when, as I have said, he can go to the people directly and get this information himself.

Now, there is another point that I think should be mentioned. The Trustee is attempting to make discovery in one fell swoop, but you do not eat an apple by swallowing it whole. You take one bite at a time. Now, the Trustee in his opposition, and I would assume this has been his position up to now, at least, indicates that his attorneys, his special counsel, have been instructed to advise him whether or not there is a basis for a suit against any individuals. They recognize that the answer to this question might be yes or it might be no. But I would suggest that



they should take it one step at a time. They should first go to the files and records of the firms they have accused of occasioning the Bankrupt's losses. Now, they can tell from those files and records if they get them for the same four-year period they apparently seek here, whether or not there was any unusual activity, whether or not there was any unusual posture during the critical period from the preceding periods during which those persons engaged in market activity. Now if there isn't, I would assume that would be the end of the inquiry. If there is, perhaps it would be necessary for the Trustees to proceed to the next step. But why at this juncture should all of these innocent traders have their business transactions and trade secrets exposed in one fell swoop when there is no reason to suspect that it will be necessary at all or that it would serve any particular practicable or useful purpose.

I don't want to take too much time on this, but the points I have been trying to make are, one, that the subpoena as it is drafted is unconscionably broad and that under the decision of Judge Keech in Continental Distillery Corporation it is too broad on its face and that it should be quashed.

Also, we have indicated that it is burdensome and oppressive. The affidavits which Mr. Caldwell and Mr. Gordon have filed in this proceeding indicate the great steps and

the great length that the Department of Agriculture would have to go to to respond to this subpoena. This is not rebutted by the Trustee , at least in so far as I have seen in their opposition. They say, well, yes, it may be difficult, but it is justified because. However, I don't think that that is an answer to the question, since it doesn't challenge the great amount of time and the great expense that it would put the Department of Agriculture. The fact that they have offered to go to these different cities around the country and examine these documents, while it may be of some use, is really not an answer to the question, because the Department of Agriculture would have to examine them all first for privileged matter. Certainly, we would not be expected, and I am sure no one would require the Department of Agriculture to simply hand the Trustee the keys to his file room and say help yourself. Certainly not. We would have to supervise this examination. We would have to examine it first, and the burden would still be there.

Now, on the matter of expense. We have stated in our affidavit that this would run into thousands of dollars. Mr. Caldwell has estimated that, even to make a limited examination, it would run approximately \$3,500. Mr. Condon, who has a great many of these investigation reports plus all of this back-up material which makes an

investigation report, reports of interviews, internal memoranda, letters from one member of the Inspector General's Office to another member of the Inspector General's office, has estimated that to compile and to comply with the subpoena as to all of those documents would take approximately ten to fifteen thousand dollars. Now, I do not see, although it may be there, in the opposition of the Trustee any offer to pay for this expense. I would assume, however, that they don't expect the taxpayer to underwrite this burden. Certainly, the Government should not have to go to the expense of thirteen to eighteen thousand dollars just to satisfy the interests of the creditors of the Bankrupt in this proceeding.

So that we have shown, I think, that the subpoena is not only broad and burdensome and oppressive but that there is no good cause. Now, on the good cause point, I emphasize that there we must strike a balance. We must strike a balance between the need of the Trustee and the injury to the Government. And we think for the reasons that I have mentioned that the balance is all in favor of the Government, particularly when the Trustee has not attempted to take this discovery in small bites in the main bankruptcy proceeding in New York.

Finally, we have said that many of these documents are in use; and under Judge Holtzoff's unequivocal ruling in

the Bobby Baker case, these are immune from discovery while the Government is using them.

Finally, we have said that many of these documents are undoubtedly covered by the work product privilege for Government attorneys.

Turning then to the statutory privilege which we say precludes the production of these documents, Your Honor has no doubt noted that we have argued that under Section 8 of the Commodity Exchange Act these documents are not subject to production. The Trustee has relied almost exclusively upon the case of Roscoe against the Board of Trade of City of Chicago, which was a decision of the court for the Northern District of Illinois in 1965.

Now, in that case the court held that Section 8, while it did render these documents confidential as far as the Secretary was concerned in making voluntary disclosure, it did not prevent them from being disclosed pursuant to court order. In other words, the court there held that, reading Section 8, he was of the opinion that while the Secretary might not be able to voluntarily disclose them, nevertheless, a court could compel their disclosure and give a protective order which would prevent any damage which might result from the production.

Now, the Government disagrees with that construction.

In the Rose case, the matter of the subpoena came up, as subpoenas often do, in a very hurried atmosphere; and we were not able to make a full presentation before the court in that case. We were unable to develop as we have done in this proceeding the history of the Commodity Exchange Act, tracing the Grain Futures Act, its reenactment as the Commodity Exchange Act and its 1947 amendment. We were not able to make a full presentation as to the rule in this district, that such documents are not subject to production.

Again, I do not notice in the Trustee's brief any opposition to our contention that the decision of the Northern District of Illinois is in complete conflict with the rule announced in this district by Judge Youngdahl in the case of Maddox against Wright, which is cited in 103 Fed. Supplement, page 400.

Now, in this case, Judge Youngdahl was faced with a demand for production of an income tax return. Now, the section which prohibits income tax returns from disclosure is substantially similar to the one involved here which makes confidential reports and other information received in confidence by the Department of Agriculture. In that case Judge Youngdahl quoted with approval a decision by Chief Judge Jones of the U. S. District Court for the Northern District of Ohio, in the case of O'Connell v. Olsen, et al.

Judge Jones said in that case:

"Such a ruling" -- excuse me, let me back up for a moment.

"Until such provision is made, this section of the court has been and is of the opinion that such returns" -- income tax returns -- "are, in private civil actions, confidential information between the taxpayer and the Government and should not be open to inspection under Rule 34, Federal Rules of Civil Procedure."

About this statement Judge Youngdahl said:

"I am in accord with the doctrine expressed in this statement. It is my conviction that until Congress declares otherwise to require the production of income tax returns in private civil actions would open the door to innumerable abuses."

This then is the conflict. In the *Rosen* case the court said: "Since Congress did not say that these documents will not be available under the Federal rules, I will assume that they are." Judge Youngdahl, on the other hand, said: "Since Congress has not said that they are producible under the Federal rules, I hold that they are not."

So that we get to the construction which is placed upon this principle in this district; and, after all, since



we are in this district, I suggest that it is Judge Youngdahl's decision which should prevail.

Now this, of course, is not the only decision in this circuit. I referred a moment ago to the Continental Distilling Corporation case, in which Judge Keech was faced with the demand for documents from the Alcohol Tobacco Tax Division of the Internal Revenue Service. In there he made the following statement:

"I further hold that many of the matters embraced are legally immune from subpoena or motion to produce as privileged or confidential such as the departmental interoffice memoranda or the formula of plaintiff's competitors, trade secrets required to be made available to the Government, but subject to protection as against others."

That is exactly what we have here. We are dealing with reports and documents which are required to be made available to the Government, but which are subject to protection against others. Both of these cases say that if you are dealing with a section which authorizes or makes documents confidential, unless that section says that they are subject to production under the Federal rules, they are not. So to this extent we feel that the Reese case conflicts with the law as it is now in this district.

Also, however, the court in the Rosee case was not presented with and did not take into account the fact that the administrative interpretation of Section 8 of the Commodity Exchange Act has been ratified and approved not once but twice by Congress. When the Grain Futures Act was reenacted into the Commodity Exchange Act many, many years ago, the interpretation of Section 8 by the Department of Agriculture was specifically brought to the attention of Congress. We have set out in our memoranda footnotes to the legislative history of the Commodity Exchange Act, indicating that Congress was fully aware that the Department of Agriculture construed Section 8 of the Commodity Exchange Act to make confidential documents received which would disclose the trade secrets business transactions of traders on the commodity exchanges. Notwithstanding and in recognition of this administrative interpretation, Congress reenacted and made the Grain Futures Act the Commodity Exchange Act, leaving intact Section 8.

Similarly, in 1947 when a subpoena duces tecum was served by Congress upon then Secretary Anderson, a response was made by the Department of Agriculture in accordance with our consistent interpretation of more than thirty years, we cannot produce. We construe Section 8 to mean that if we must make this disclosure, as you have requested here, we would have to make public disclosure of the information

produced. This information is immune from production.

Now Congress, in apparent acceptance of that position, passed the 1947 amendment which authorized him to make this production and which corrected the problem at least in so far as he had it at that point. The 1947 amendment, therefore, constitutes a second recognition by Congress of the administrative interpretation.

Now, we have cited the Allen case in our memoranda; and in the Allen case you will find the Shapiro and the Holstein cases, all for the proposition, and this is very important, that whenever Congress is apprised of an administrative interpretation and when it reenacts legislation continuing, in effect, a section as it previously was, it is assumed to have incorporated and accepted that interpretation into the statute, and that interpretation thereafter has the effect and force of law.

Now, that is the situation exactly what we have here. I say, however, this matter was not presented to the court in the Rose case largely because of the time and logistic problems that were involved. In any event, we think that all of these considerations militate strongly against producing this information in this case.

But beyond all of these considerations, even if we were to give full weight to the Rose case, even if we were to

ignore the fact that it conflicts with the decision of Judge Youngdahl in Maddox against Wright, or even if we were to ignore the fact that it flies in the face of the legislative history, there is nothing in the Rosee case which would support the subpoena in this case. It is as different as night and day.

First of all, in the Rosee case, the subpoena, it was actually a very narrow subpoena. It related, as I recall, only to one future commission's merchant on the exchange and several other people who were parties to the litigation. There was a suit by Rosee which included as defendants two employees of the Department of Agriculture. They were named as defendants. Now, the court said, the documents written by these employees, or prepared under their supervision, are no where else but in the files of the Department of Agriculture; and I am unwilling to allow the Secretary of Agriculture to draw a cloak of secrecy over the acts of his subordinates. So I am going to require the Secretary of Agriculture to produce all documents, or documents within certain limits, he went into it at great length; and you will notice by a reading of the opinion that they didn't get all what they asked for, that he limited the production to documents prepared by these employees. He also said, however, in there that as to many other documents there was absolutely no showing of good

cause, although there was a much greater showing than there is in this instance for production of other documents which he termed privileged. These included intragency memoranda in matters which are all intertwined with the subpoena we have involved here.

Furthermore, as I have said, in the Rose case we were dealing with a very narrow demand for documents. Here the Trustee is asking for the reports filed by all traders for a four-year period. There they were asking for only one future commission merchant's and other parties who were parties to the litigation.

In this case, of course, in the opposition which we received, and as I have mentioned previously, we have not had an opportunity to digest it, there are suggestions of involvement, very vague suggestions, as to involvement on the part of the members of the New York Produce Exchange and there are even insinuations that individuals within the Commodity Exchange Authority itself might be potential defendants in a legal action. Beyond insinuations, no one has named names, much less has there been any identification tantamount to naming them in a lawsuit, such as there was in the Rose case.

However, the basic point which we must keep coming back to in a consideration of this subpoena is the fact that this is, as Judge Dawson said, just an attempt to have a

roving commission, to go through all the files of the Department of Agriculture. Essentially, as I have said, this subpoena wants everything we have got; and we don't even know what we have got. And I do not believe on the showing that has been made or the showing that can be made that we should be required to respond to this subpoena. It is not only burdensome and oppressive, it not only seeks the production of confidential documents, not only documents which we are presently using, but which may not be at all necessary to the Trustee at this point. The Trustee will really not even know whether they are necessary until he goes out and examines the files and records of the persons he suspects to have occasioned their losses.

I have taken too much time on this already. So I will conclude.

It is our judgment that this subpoena must be quashed, that the Trustee should be admonished to seek these documents from other sources that are available; and if he runs into trouble and then if he can state his subpoena with greater particularity, he can come back to us.

Thank you for the courtesy.

THE REFERENCE: Yes, sir.



MR. LOBELL: May it please the Court, before the Trustee directs his attention to the Government's arguments, I think there are first a few things that need clearing up.

Number one, reference has constantly been made by the Government to the litigation that is pending in New York. At this point, I think it should be noted, as is pointed out in the order of appointment which is attached to the memorandum that the Trustee has submitted, that the Trustee is in no way involved with the litigation in New York. In fact, Your Honor, that litigation was instituted on behalf of some of the limited partners of Ira Haupt & Co., who after two appeals were decided were permitted to continue this litigation in a derivative nature in the absence of the Trustee's decision under the case of Meyer versus Fleming as to whether or not to intervene. The defendants named in that case are the New York Produce Exchange, the New York Produce Exchange Clearing Association, Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Bunge Corporation, and as nominal defendants, Ira Haupt & Co. and Morton Kamerman.

The Trustee is not involved in that case. In fact, one of the reasons that the firm of Weil, Gotshal & Manges was appointed as special counsel to the Trustee was to investigate the facts and circumstances underlying that case and determine whether or not the Trustee should in fact

take over that case.

Now, in that sense, another thing must be noted. That case only named a few individuals. The Government tells us to go to the parties who were involved and get the documents.

Number one, being a 21(a) proceeding, of course, it must be pointed out that no parties are involved, and that a 21(a) proceeding is to investigate into the acts, conduct, and property of the bankrupt and the essential determination is whether or not the person who is called for examination possesses information concerning the acts, conduct, or property of the bankrupt.

As we will show later on, a potential cause of action is certainly a property of the bankrupt, and that is what the Trustee is investigating.

More important, however, is the fact that the Government keeps referring to a cause of action which we may have. That is not the question, Your Honor. We have a cause of action. The question is against whom. And that is why we can't go to the four people who are named in the Klebanov case, because they are not necessarily the only persons involved. As we will show, this was the greatest debacle that had ever occurred in commodity futures trading in the history of the United States. In a period of less

than seven days the instant Bankrupt lost twenty million dollars in cottonseed oil and soybean oil futures trading. These markets under the Commodity and Exchange Act are required to be regulated by the contract markets themselves and supervisory authority by the Department of Agriculture.

There is authority, as we will show, for the proposition that a party who has been injured by a failure of a person to properly exercise regulatory responsibility has a cause of action.

The question, then, is not whether there is a cause of action, but against whom; and when we discuss the subpoena, we will see that the subpoena seeks documents to enable the Trustee to determine who profited, who lost, who got the twenty million dollars that Haupt put in the last seven days, and whether or not those people should name in a cause of action and also whether the contract markets themselves should be included in a cause of action.

Another thing that is very significant, which we will just advert to at this point and elaborate upon further, is that there are no trade secrets involved in this case. All the trade which the Trustee is seeking information about has been closed. They have been closed for a period of two years; and as will be demonstrated, what Congress was concerned about is prohibiting disclosure of confidential

information was competitive advantage, as it has been with many other statutes, such as antitrust laws. There is no competitive advantage here. The Trustee can't trade or profit by knowing these transactions, nor can anyone else.

However, to get to the Government's contentions themselves, the Government is painting here with a broad brush this subpoena in an attempt to confuse three narrow issues which the Government raises in its own memorandum.

Number one, is the subpoena so broad and oppressive that it must be quashed?

Number two, has the Trustee shown good cause?

And, number three, are these documents which the Trustee seeks prohibited from disclosure by the Secretary of Agriculture pursuant to Section 8 of the Commodity Exchange Act?

The policy considerations which the Government raises are very significant, but they have no importance here. A formal claim of privilege has not been raised by the Government. What we are dealing with is whether or not they are prohibited by statute from the production; and as will be shown, they are not.

Now, for the purpose of demonstrating that the Trustee is hardly seeking a "roving commission" into the files of the Department of Agriculture, I think it would be

necessary to give some background of the affair/<sup>out</sup> of which the subpoena arises and also to describe the subpoena which no one has seemed to take time to do yet.

On November 20, 1963, the New York Produce Exchange on which cottonseed oil futures are traded suspended trading in cottonseed oil, and the position of Ira Haupt, which was holding that for Tino DeAngelis at that time, was closed out. At the same time, on that day, the position of Haupt for DeAngelis in soybean oil on the Chicago Board of Trade was liquidated.

As a result of these actions and as a result of the decline in the prior weeks starting November 15th in prices in cottonseed oil and soybean oil futures, Ira Haupt & Co. on behalf of Tino DeAngelis lost twenty million dollars. This money was paid to the shorts who had profited on the plunging futures prices. There is nothing improper about this, Your Honor. That is the rules of the exchange. The money was paid in by Haupt, as it was required to do; and it was paid to those who had profited on the downward prices.

Now, to understand this, we have to go back to some extent to the beginning of 1963. At that time, it appears, trading in cottonseed oil hit fantastic proportions. In terms of volume, never before in the history of that market had the volume been as it was during that year. Testimony

which the Trustee has elicited in 21(a) examinations of officials of the Produce Exchange indicated that they considered that market to be the most unique, the most unusual, in fact, the most insane market that had ever been in the history of the New York Produce Exchange. The reason for this, it appears, was Tino DeAngelis.

As Your Honor may know by now, Tino DeAngelis was involved in what has been colloquially referred to as the great salad oil swindle. This involved both the disappearance of phantom oil and his activities on the commodity futures market. It is the latter with which we are concerned here today.

Tino DeAngelis did so much trading that at one time in 1963 Mr. DeAngelis had 8,133 long cottonseed oil contracts. This represented 71 percent of the long open interest. At the same time his holdings in soybean oil at the Chicago Board of Trade, which is a far broader market, I may say, were approximately 8,000 contracts representing 23 percent of the open interest. Your Honor, this is without precedent in the annals of those exchanges; and as demonstrated by the testimony that was also elicited by the Trustee, it was feared that a corner was occurring or a manipulation. In fact, as one of the witnesses testified to, that was the basis upon which the Commodity Exchange Authority officials suggested or



recommended that the market be closed on November 14, 1963, November 15, 1963, and November 18, 1963. It appears at that time after prices had declined the Commodity Exchange Authority, which is charged with exercising regulatory responsibility over the operation of these contract markets, became very concerned, so concerned, in fact, that they kept calling the officials of the Produce Exchange to find out what the Produce Exchange was doing. The Produce Exchange, it seemed, at first did not heed the recommendation of the Authority to close the market but waited until the 20th. On the 20th, it may be noted, the price was four cents lower or two cents lower than it had been on the 14th. That cost us twenty million dollars.

In addition, however, to the unprecedented volume which was happening at that time, there are other indications that something was wrong with the market. Included among this were increase in warehouse capacity, more deliveries of oil, concentration of position in the hands of few interests, as again is indicated by the testimony that is summarized in the affidavit submitted on behalf of the Trustee and attached to the memorandum of authorities submitted on behalf of the Trustee. Indeed, an official of the Produce Exchange testified that there was a manipulation that had occurred during that year.

Now, starting on Friday, November 15th, as has

been mentioned, the price of cottonseed oil and soybean oil began to decline. Short selling intensified. This drove down the price. There is no apparent reason why this happened or, at least, no satisfactory explanation has been given yet. DeAngelis as the long had to pay the shorts who were profiting; and Haupt, complying with the rules of the Exchange and acting as DeAngelis's broker, as indeed it had since May 1963, had to pay the Exchange; and the Exchange distributed it to the shorts. Haupt had no choice. The rules provide that if the customer can't pay when a price declines and you are a holder of the long position the broker must pay; and Haupt paid. Thus, on Monday, November 18th, short selling intensified. Cottonseed oil and soybean oil went down one cent a pound and Allied's losses for the day amounted to ten million dollars which Haupt paid. Again on the 18th soybean oil was hammered down one cent in an unprecedented frenzy of trading amounting to 13,000 contracts, which is three times the previous daily volume, record volume. Cottonseed oil was down a quarter of a cent because of a special rule imposed by the Produce Exchange, and Haupt again paid nine million dollars.

On the 20th, finally, the Exchange was closed. The price at which it was closed left Allied's brokers with a two cent per pound loss.

The basis for this 21(a) examination pursuant to

which the subpoena has been issued is clear. Haupt's losses arise from trading on a regulated commodity exchange. The contract markets, as is pointed out in the Government's own brief, are charged with the duty of regulating those markets.

Section 5d of the Commodity Exchange Act provides that a contract market designation as a contract market may be revoked by the Secretary of Agriculture if the exchange fails to prohibit manipulation and cornering.

On the basis of the facts and the testimony received by the Trustee, it is clear that a manipulation or corner was effected during 1963; or at least if not conclusively demonstrated, seriously significant questions are raised to make inquiry proper. This is because there is authority for the proposition that a person who has sustained injury as a result of a failure of a federally regulated exchange to properly regulate its market may have or does have a cause of action against that exchange. That is very significant, as will be shown when we discuss the records sought from the Department of Agriculture here.

The cases upon which the Trustee relies for this proposition are *Baird v. Franklin* and *Pettit v. American Stock Exchange*, which are cited in the Trustee's memorandum. *Baird v. Franklin*, which is cited in the Trustee's memorandum on page 9, involved the defalcation of Richard Whitney, who

was at that time treasurer of the New York Stock Exchange and of the New York Yacht Club. The case held, in effect, that when the New York Stock Exchange first found out about Mr. Whitney's embezzlement and failed to suspend him when he did it again, the person from whom the embezzlement took place the second time had a cause of action against the Exchange because they failed to comply with their responsibility under the Securities and Exchange Act to properly regulate their market.

The same holding is in *Pettit v. American Stock Exchange*, which involved the embezzlement of Lowell Birrell in Swan-Finch Oil Company, also cited on page 9 of the Trustee's memorandum. The proposition, however, is clear. A person who is injured when a federally regulated exchange fails to discharge its statutory responsibility to regulate has a cause of action.

So there is no question that the Trustee has a cause of action. The only question is against whom? And I say that because there is another element here. We have mentioned that the prices on November 15th started downward for no apparent reason. As is also recognized, Section 4 of the Clayton Act gives a cause of action for treble damages in favor of anyone who is injured by reason of a violation of the antitrust laws. A "downward manipulation," Year

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Honor, would be the violation of the antitrust laws. The important question is, Who engaged in it? And this, as will be shown, can only be ascertained from an investigation of the records of the Department of Agriculture. This is the only place in the United States where all records relevant to trading on the commodity exchanges, and I should note at this point that there are only two commodity exchanges involved or two contract markets involved, or two commodities involved, primarily, soybean oil and cottonseed oil. As will be shown again by regulations issued pursuant to the Commodity Exchange Act, traders, futures commission merchants, and clearing members of contract markets must file daily reports indicating their positions and their trades once they reach a certain what is called "reportable position," which is a large trader position; and only by inspecting these records can it be determined who engaged, if indeed there was a downward manipulation on the exchange starting the 15th, and only then can it be determined whether or not the exchanges properly exercised their regulatory responsibility.

There is also authority for the proposition, however, that when a contract market and officials of the Government conspired to injure a party, a cause of action is vested. We have not gone into this in detail other than to state that a cause of action would exist, because all of the details

behind it are not available to the Trustee yet. This would be the only area where the Trustee would be looking to see if a cause of action does in fact exist. In the others, it clearly exists. We are only trying to find out who hurt us.

Now, the Government has, as was mentioned, painted the subpoena with a very broad brush; and in so doing, no doubt, has somewhat confused what the subpoena calls for.

At this point we would like to briefly discuss what we are asking for.

Paragraphs 1, 2, and 3 of the subpoena call for the daily reports which are filed with the Commodity Exchange Authority.

THE REFEREE: Excuse me just a minute. I don't have a copy of the subpoena. Does that cover the same items as you had attached to your petition?

MR. LOBELL: Yes, it does.

THE REFEREE: Very well.

MR. LOBELL: Paragraphs 1, 2, and 3 of the subpoena call for the daily reports filed with the Commodity Exchange Authority by traders, futures commission merchants and clearing members of the contract markets involved. These reports, as the Government itself has pointed out, comprise the overwhelming percentage of the documents whose production is sought. The reports indicate daily trades in positions

in specified commodities and are filed for the purpose of enabling the Secretary of Agriculture or the Commodity Exchange Authority to ascertain the manner in which trading upon contract markets is being conducted and whether the requirements of the Act are being complied with. This is the same thing that the Trustee is seeking to ascertain. It is only through an examination of these reports that the Trustee can determine trading patterns on the exchanges during the crucial periods and whether the persons, firms, and organizations who are suspected or who may have caused injury to the Bankrupt did in fact do so.

As far as persons suspected of causing injury to the Bankrupt, I should at this point also note that these cannot be identified at this time with any particularity. They may in fact be anyone who is trading on the exchange who engaged in short selling. The reports, since they are only filed by what is referred to in the Government's vernacular as large traders, can involve anyone there who could have injured the Bankrupt, who could have engaged in a conspiracy. We don't know who they are.

THE REFEREE: Do you know whether or not there was a conspiracy?

MR. LORELL: As far as the conspiratorial natures of it are concerned, the only basis for assuming that there was



a conspiracy at this point was that the prices were driven down and that there was no apparent reason for it. Allied, Haupt's customer, was the only long in the market at that time, it must be remembered. There was nobody else holding the long position. Allied was the only long. Everyone else was short in the market. When the market started to fall on the 15th, of course, it was due to the action of the shorts in engaging in further short selling. Who did this we don't know or exactly how they did it we don't know. This can only be determined from an examination of the records which are sought here, namely, the daily trades and positions.

THE REFEREE: But could not it have happened in the normal course of events without any conspiracy and without being a malicious act on somebody's part?

MR. LOBKILL: Ordinarily, yes, you can have a fall in the market without malice or in the ordinary course. According to the testimony which the Trustee has elicited in 21(a) examinations, however, there was no basis for all of a sudden just everybody selling short. There was just no reason for it. If you had good business reasons for it, it would be one thing. Tino DeAngelis, it must be remembered, at least since September 1963, had the same position in the market that he had as of November 14, 1963. Why all of a sudden

everyone on November 15, 1963, decides to sell short is not clear. There was no business reason for it. Testimony has conclusively established that. There was no change in the market at that time to give rise or basis for good business judgment of heavy short selling. There was some reason for it.

Now, one other thing should be noted. The Commodity Exchange Authority, as far as these records are concerned, which, as I say, are the largest bulk of the records sought here, is the only place in the United States at which all reports of the three classes of persons who are required to file reports are centrally located. The Act or regulations pursuant to the Act require traders to file, futures commission merchants, which we more than likely know as brokers, and clearing members of contract markets to file. For the Trustee to go out and look for the records of every clearing member, every futures commission merchant, and every trader, and he doesn't even know who they are, would be an impossible task, a task not only involving an expenditure of totally staggering sums of money but a task involving a consumption of time by which an investigation if it ever did complete it I dare say the statute of limitations would have run a long time ago. The Government has them all together.

Paragraph 4 of the subpoena relates to investigations

undertaken by the Secretary pursuant to authority granted in the Act regarding market conditions. As noted in the Trustee's brief, I don't think, the Secretary has agreed to produce some documents; and I think at one of the conferences with the Government we had indicated what we meant by this paragraph was only documents of a public nature; and I don't think there is any objection to producing those documents in so far as they do call for published reports.

Paragraph 6 of the subpoena relates to investigations of the operations of the Chicago Board of Trade and the New York Produce Exchange pursuant to the authority contained in Section 8 of the Act. Specifically mentioned in that paragraph are investigations directed at failures to regulate. Obviously, any such documents are highly significant and would be crucial to the Trustee's determination of whether causes of action lie against the Produce Exchange and the Board of Trade. The only basis for refusing to disclose them would be if they were prohibited from disclosure which, as we will show, is not the case here.

Paragraphs 8 and 9 of the subpoena call for documents relating to information on the commodities involved which was communicated during the year 1963 by the Secretary or any of the officials of the Department of Agriculture to the Board of Trade and the Produce Exchange.

This, Your Honor, is very significant. One of the exceptions to the Act which we will discuss later on authorizes the Secretary to communicate information to the proper committee of the contract market charged with regulating the market in an attempt to enable it to exercise its regulatory authority. Crucial to the Trustee is the determination of whether or not the Secretary, in fact, communicated any information to the contract markets involved, because it is only in such light that their exercise of regulatory responsibility can be properly determined.

At this point it should be mentioned that on November 14th, testimony has it, the Commodity Exchange Authority at the request of the Produce Exchange did furnish the Produce Exchange with a list of all outstanding positions. The market was hectic during the entire year, not just November, and testimony given by the Produce Exchange officials say that prior thereto they had requested these positions from the Department of Agriculture as Commodity Exchange Authority, and such request was refused. This is very significant not only to show the involvement of the Department of Agriculture in this affair but to enable the Trustee to determine whether regulatory responsibility was properly discharged in the light of the information available to the contract markets.

Paragraph 11 of the subpoena calls for documents

relating to communications in the year 1963 between officials of the Department and persons trading in the commodities involved with respect to such commodities. As with communications to the contract markets, these documents are essential to a determination of whether any person acted improperly on the basis of information which was peculiar or special to them.

Paragraphs 12 and 13 of the subpoena call for documents including investigations of regulatory failures and other violations of the Act. These documents are sought for the purpose of enabling the Trustee to determine by comparison whether similar violations occurred in connection with the events leading to the failure of Allied and the bankruptcy of Haupt.

Paragraph 14, on the other hand--

THE REFEREE: Excuse me. In 12 you refer to all documents for the period January 1, 1935, to December 31, 1963. Is that 1935 date correct?

MR. LORELL: Yes, Your Honor. This is the reason. Recognizing that that seems like an interminable period of time, one of the problems is that the Act itself contains no definition of what constitutes a manipulation or corner. In order to determine that question, to a great extent it becomes

significant to determine how the Government agency charged with administering the Act or what the Government agency charged with administering the Act has viewed as a manipulation or corner. This paragraph asks for investigations into the Boards of Trade for manipulation to enable the Trustee to determine what the Department of Agriculture considers to be a manipulation or corner and to determine whether or not the boards involved failed to exercise their regulatory responsibilities.

Paragraph 14 of the subpoena calls for information furnished the Commodity Exchange Authority by persons operating in the relevant markets. These documents, if indeed there be any, would furnish a basis for analyzing the actions of such persons in light of their own appraisal of the market. If, for example, Your Honor, someone says that a stock is going up in published reports but sells short on the other hand, some inference can be drawn from that; and one must know what his published statements as to how he viewed the market was. These documents, if there be any, are filed pursuant to the Act by persons trading in the Act to the extent they affect market conditions or price; and if there be any, they are crucial to the Trustee to determine what the published position of the person is. So then he can look

at what was actually done and determine whether it was consistent or not.

Paragraph 15 of the subpoena calls for information relating to unclear transactions which would certainly affect the market price and furnish a basis for determining whether any attempt was made to artificially affect the market.

Paragraphs 17, 18, and 19 of the subpoena relate to complaints, investigations, or action taken with respect to the activities of Haupt, Allied, and certain designated persons and firms affiliated with or doing business with Haupt or Allied. To the extent that such documents would reveal violations of law or improper conduct by such persons, they would be extremely significant to the Trustee's determination of whether causes of action arising out of such violations exist.

In opposition to this subpoena, Your Honor, the Government makes three claims: one, that the subpoena is burdensome and oppressive; two, that no good cause is shown for the production of the documents; and, three, that they are prohibited from disclosure by law.

Each of these contentions, it will be shown, is without merit in the instant case.

With respect to the subpoena being burdensome and oppressive, the Government relies on the fact that the



subpoena calls for "all documents," and this is, according to the Government, an indication that the subpoena has not designated the documents sought with sufficient particularity as is required by Rule 45 of the Federal Rules of Civil Procedure.

First, it can be noted that if the subpoena is burdensome and oppressive on anyone, it is the Trustee. He is the one who has to examine all the documents.

THE REFEREE: Let me ask you something at that point.

Assume that the Government had not raised objection to this subpoena and assume that Mr. Freeman had appeared here with these documents, how long would it take for him to be examined in connection with these documents, years?

MR. LOBELL: Well, no, I would think rather that if the Trustee had an opportunity to examine the documents themselves and come to a conclusion with respect to it, an examination of the Secretary of Agriculture, if indeed he had any knowledge as to exactly what was contained in the documents, would not take too long.

THE REFEREE: Let us assume then that the Government would open up its files to you on all of these documents, how long would it take for the Trustee to conduct his examination of all these documents privately?

MR. LOBELL: The trading reports, Your Honor, which as we all recognize is the great bulk of the documents sought here, would not take that long to analyze. I would say a month. The answer to that, Your Honor, depends to a great extent on how many persons could be assigned to the job. As the Government has recognized itself in collecting some of its information, it says thirty man years. Well, it depends upon how many people you can spare and how many people you can put on it.

THE REFEREE: What are those people going to be looking for?

MR. LOBELL: In the trading reports?

THE REFEREE: Any area you want to pick out, what are they going to be looking for?

MR. LOBELL: Let us take the trading reports. What they will be looking for there is to determine the trading patterns of traders in cottonseed oil and soybean oil. Now, as to why it is necessary to look at more than the trading pattern for the year 1963 itself is obvious. This is so because only by comparing what someone has done in the past are you able to determine whether what he is doing at this point is unusual.

THE REFEREE: Well, I hope nobody ever checks me out on that basis.

MR. LOBELL: Well, I submit, Your Honor, that in 1963, which was concededly an unusual year, you cannot look at someone for that period and say he was doing something unusual unless you can see what he was doing in the past. These transactions, you must understand, are two types of transactions basically, hedging and speculating. What is meant by that is that a person who has an inventory position of a product would hedge in the market presumably by going short so that if the value of his inventory declined, if the price went down on the market and the value of his inventory declined, he would make up the spread by the extent to which the price declined on the market.

Speculators, on the other hand, are those people who are willing to engage in risks not having actual inventory or against forward sales and who are playing on the price swings of the market.

Also significant, Your Honor, is that the reports filed with the Commodity Exchange Authority designate whether the individual is a speculator or a hedger. This determination would be crucial if the designation changed in the relevant period. For example, if a person was a hedger for the past two years and became a speculator here, there would be basis for the Trustee making inquiry as to what caused that and what

he had done.

As far as the Government's contention that the subpoena is burdensome and oppressive, as has been pointed out by Professor Moore, the purpose of requiring a designation of documents is to enable the person who received the subpoena to identify the documents with reasonable particularity. That the Government has been able to identify them is here obvious, and that designation by category is sufficient, and that the categories need only be reasonably described is the prevailing view. This is substantiated by Professor Moore, which is cited in the Trustee's brief, and by the Advisory Committee to the 1946 amendment of the Federal Rules of Civil Procedure, at which time the question was raised that an amendment to Rule 45 and 34 was necessary to the extent that claims were being made and cases were holding that particular documents had to be itemized.

The Advisory Committee at that time said that the prevailing view as announced by the Supreme Court in the Brown case cited in the Trustee's brief and in the Consolidated Rendering case, that only designation by category which will enable a reasonable man to identify the documents being sought was necessary.

To that extent, Your Honor, we think that the subpoena here certainly complies with that requirement.

And the cases cited by the Government aren't contrary to this principle. The Continental Distilling case, in which it is admitted a subpoena was quashed in which all documents were called for, it was pointed out by the court in that case that no good cause had been shown for the production of the documents; and there was also a question of privilege involved. In the Hale v. Henkel case, there was no limitation of subject matter in the subpoena, the court did quash the subpoena. Of course, it is submitted that failing to limit the subject matter was crucial. But even more important, the court recognized in its own opinion that perhaps all of the documents sought in that case would have to be produced at a later stage. That was a Grand Jury proceeding, Your Honor. But the court said that at that point of the proceeding sufficient necessity had not been shown yet.

The one case that the Government cites, the Sheffield case, in that case the court did in fact condemn the use of the word all. From this, however, the Government seeks to apply a rule of universal applicability even to subpoenas such as the instant one where the subject matter of the documents sought is described sufficiently to enable the person looking at the subpoena to determine what is being sought.

Even if this were not the case, however, Your Honor, as is pointed out by the Court of Appeals for this circuit in a case cited by the Government, Westinghouse Electric versus City of Burlington, Vermont, the court must try to accommodate the parties. In that case the circuit court said that the lower court should have sought some way to accommodate the interests of the defendants herein with the practical problems of searching the Government's voluminous files. It was recognized. That also, by the way, Your Honor, was a case involving a subpoena duces tecum which was served upon a representative of The Attorney General and in which a motion to quash on the grounds that it was unreasonable and oppressive was raised by the Government. The district court, the circuit court said, should explore the matter fully in an effort to accommodate the interests of the defendants and then consider whether the subpoena is so oppressive that it cannot be granted even in a modified form. The fact that these are very important cases with large sums of money at stake, the court said, is relevant in determining the reasonableness of the subpoena; and even though the subpoena is addressed to a nonparty, inconvenience occasioned by compliance with the subpoena is not a sufficient reason to quash. The paramount interest of the Government in having justice done between litigants in the Federal courts

militates in favor of requiring a great effort on its part to produce any documents relevant to the litigation.

The next argument relied upon by the Government is that the Trustee has not shown good cause. In advancing this contention, the Government says that compelling necessity need be shown or that special circumstances need be shown. The cases cited for this proposition are clearly distinguishable. The test of special circumstances was laid down in the Alltmont case cited by the Government involved almost exclusively the work product of an attorney which, as recognized by *Hickman v. Taylor*, is accorded special status. Most of the documents, if any of the documents here, do not involve work products, certainly not the trading reports.

As far as the test of compelling necessity laid down by the Supreme Court in *Procter and Gamble*, that case, Your Honor, involved an attempt to get minutes of a Grand Jury in an antitrust case. And the court stated that in view of the historical policy of the secrecy of Grand Jury proceedings, these would only be produced on a showing of compelling necessity.

In fact, Your Honor, the correct test for good cause was laid down by the court in this district in *Boeing Airplane versus Coggeshall* cited in the Trustee's memorandum, and that test is that good cause is sustained by a claim



that the requested documents are necessary for the establishment of the moving party's claim, or that the denial of production would cause the moving party undue hardship. That the documents herein sought are necessary is obvious. To require the Trustee to go out to thousands of traders, futures commission merchants, and clearing members in an attempt to get the documents which are located at one place would be an undue hardship.

THE REFEREE: What is the moving party's claim in this case?

MR. LOBELL: Our claim?

THE REFEREE: Yes.

MR. LOBELL: Against whom?

THE REFEREE: I don't know. I want to know what it is and against whom it is. So far as I get the picture, because there was an odd sort of movement in the market, the assumption is being made by the Trustee that that created an irregular condition which could result in somebody conspiring to do harm to the market in a way that caused the Bankrupt loss. But you just read a decision that has to do with a specific claim by a specific party and against a specific party.

Do we have a specific claim in this case?

MR. LOBELL: Well, Your Honor, in so far as this

is a 21(a) proceeding in which the Trustee is investigating into the acts, conduct, and property of the Bankrupt and not a filed case, there can be no claim in that sense, there can be no parties.

THE REFEREE: All right. Let us approach it from that point.

Wherein are the acts, conduct, or property of the Bankrupt involved beyond the fact that speculatively you may have a cause of action?

MR. LOBELL: Well, there are three things: One, a potential cause of action within bankruptcy is property of the bankrupt.

THE REFEREE: But where is the potential cause of action?

MR. LOBELL: The potential cause of action, one, arises out of the failure of the contract markets involved, namely, the New York Produce Exchange and the Chicago Board of Trade, to properly exercise their regulatory responsibility to regulate trading on these contract markets. That is one claim.

If a manipulation or a corner was effected on those markets and if as a result of that manipulation or corner the Bankrupt was injured, and if the exchange failed to prevent that, as it is required to do by Section 5d of the

Commodity Exchange Act, a cause of action against that exchange or those exchanges would be vested in the Bankrupt. That is one claim.

Another claim is based upon a possible antitrust violation in engaging in a downward manipulation of prices. This claim would be lodged or asserted against traders of and members of the exchange rather than the exchange itself. That claim is not based upon a failure to comply with a regulatory requirement, but it is based upon a violation of the antitrust laws. That the price did go down for no explicable reason to a phenomenal extent in a period of less than seven trading days is clear. Who caused it to go down? That the Trustee does not know. That is another claim. These are the claims which the Trustee is investigating in this case.

The Klebanow case referred to by the Government involves only the latter portion of it, a downward manipulation. In that case that is what the Trustee or special counsel was retained to investigate. That is only one aspect.

THE REVEREND: I want to get this straight. These claims that you have just enumerated are the causes of action that the Trustee would undertake in the event he found there was evidence to support them, is that the idea?

MR. LORELL: No, Your Honor. The only question at

this point is, Who engaged in it? That a cause of action exists is clear. The testimony taken in 21(a) examinations, just a summary of which is contained in the affidavit filed in support of the Trustee's opposition here, and a listing of which is also in that affidavit, indicates clearly, without question, in fact, testimony obtained from officials and members of the New York Produce Exchange during examinations conducted pursuant to Section 21(a) of the Bankruptcy Act, indicate that during 1963 long positions had never before been accumulated in the manner in which they were accumulated, that the activity during 1963 was the most unusual that could ever be recalled, that the texture of the market during 1963 was different than ever before in terms of volume, trading, ex-pit deliveries, that the concentration of positions during October and November 1963 was "immense" and "unique," that there was an insane accumulation of positions, that what had happened during October and November of 1963 was a manipulation, testified to, Your Honor, by an official of the Produce Exchange who is on the board of directors; that the accumulation during this period was artificial, tending to make the price higher than it otherwise might have been.

Now, if all of this is true, which officials of the exchange themselves have testified to, then the exchange had a statutory responsibility to regulate the market in which it

failed. If it failed, a cause of action on the part of the Bankrupt who was injured as a result of the failure of the exchange to exercise its authority is vested. That is one thing.

Another, and quite apart from that, is the question of a claim under the antitrust laws. And some idea as to who would engage in a downward manipulation it is apparent that the Trustee does have. There are certain companies who were large traders who were called to testify in 21(a) examinations whom the Trustee knows of; but the full extent of it, the full ramifications of it, are not known to the Trustee; and that is what we are trying to determine here.

The last point raised by the Government is that the documents are prohibited from production by Section 8 of the Commodity Exchange Act.

In this connection, Your Honor, a few points need to be made. First, the section to which the Government refers by its very terms limits the prohibition to data which was garnered in investigations. The trading reports here involved are not the results of investigations undertaken by the Secretary, but rather are filed on a daily basis. And thus there is some question as to whether or not the prohibition of that Act even applies.

In support of its proposition that it does apply,

the Government refers to the Bartlett Frazier and Hyde case in which the court said trading reports were covered by Section 8. On the other hand, the Rosee case, which the Government attempts to distinguish, and we will discuss later why it is not distinguishable, even assuming that the reports herein sought, the trading reports, are covered by Section 8, to which there is some question, because it is an extension of the clear words of the statute, indicates that production in response to a subpoena duces tecum is not a "publication" within the meaning of the Act. That the Act refers to voluntary publications of certain type of document by the Secretary, but prohibits him from producing voluntarily documents which were separately disclosed, trade secrets, names of customers, or business transactions of individuals. Of course, it need be noted that trade secrets are not involved here any more. These trades are closed. They have been for two years. This was also recognized by the court in Rosee.

One other thing should be pointed out, Your Honor, and that is that the Bartlett Frazier and Hyde case which brought the trading reports within the purview of Section 8 in no way dealt with the question of whether or not a production in response to a subpoena duces tecum was a

"publication" within the Act. That case involved a challenge to the constitutionality of the reporting and investigative provisions of the Commodity Exchange Act. In upholding these provisions, the court cited the Supreme Court decision in Board of Trade versus Olsen which upheld the whole Act as a legitimate exercise of Congress's commerce power and referred to the fact that the investigative and reporting provisions were ancillary and necessary to carry out the objectives of the Act. The case in no way considered whether or not production in response to a subpoena duces tecum was a "publication" within the meaning of the Act.

Roscoe versus the Board of Trade, cited in the Trustee's brief, on the other hand, specifically considered this question under Section 8 of the Act and held that production in response to a subpoena duces tecum was not "a publication within the meaning of the Act."

It further went on to point out that when Congress had intended to proscribe the use of Government held data in judicial proceedings it did not talk in terms of publish or publication but rather expressed the prohibition explicitly.

Finally, more important here, Your Honor, what the Government is really saying is that it doesn't want to give us the documents. Why do I say this? Because under Section



8(a)(6) and Section 8-1 of the Commodity Exchange Act the Government has the discretionary authority to make these documents available here and to make them public in so far as they relate to a market operation which adversely affected the public interest. That this market operation was adverse to the public interest the Government apparently does not contend. All it says is that for policy reasons it refuses to exercise its discretion. But that is not the issue. Conceding that it has the discretionary authority to make them available under one of the exceptions to the Act, under such circumstances it cannot then turn around and say that these are prohibited, particularly in response to a subpoena duces tecum, from production by Section 8 of the Act. This is over and above the question of the Rose case, that production in response to a subpoena duces tecum is not publication within the meaning of the Act. What we are saying here is that the Secretary can do it if he wants to and seeks to take refuge in Section 8 in saying that he can't do it. But he concedes that he can under one of the exceptions. This, Your Honor, we submit, the Department of Agriculture should not be permitted to do.

Finally, with respect to the grounds which the Secretary advances for refusing to exercise a discretion, even if it were a question of discretion, which we submit it is

clearly not, these also are without foundation. There are no trade secrets involved here. As we said, the trades have been closed for a long time. There is no question as was recognized in Rosee of insuring the accuracy of the reports filed since their filing is required by the Act and if someone fails to file them, they can be suspended from trading.

Nor is there any basis for distinguishing Rosee in the instant case, from the instant case. The fact that the amount of documents which was called for in Rosee was quantitatively less substantial than the amount of documents in the instant case does not relate to the court's interpretation of Section 8 of the Act. That is another question altogether.

And, finally, the question of Government involvement which the Government raises with regard to Rosee is also of mistaken significance. As pointed out in the Rosee case itself, governmental involvement is significant to the extent that a formal claim of privilege is made. That is so because the law as to whether or not production of documents will be required when a formal claim of privilege is made differs in cases where the Government is involved; and where it is not, there is no claim of privilege, none made here, only a claim that the documents are prohibited from production by the Act, which we contend clearly is not the case. And

even so, if the test of governmental involvement were the proper one, we submit that the testimony taken by the Trustees in 21(a) examinations shows the extent of governmental involvement here.

It has been testified to that the Produce Exchange did not pass rules affecting or regulating trading in commodities without first clearing them with the Commodity Exchange Authority. It has been testified to that the Commodity Exchange Authority was in a position during the entire period to determine whether traders were truly hedgers or speculators and that the exchanges themselves were not. Of course, it now becomes important to determine what information was communicated to the exchanges by the Secretary.

It has been testified to that a director of the Produce Exchange believed the Commodity Exchange Authority failed to discharge its responsibility in the DeAngelis affair since they had the positions of all persons trading in cottonseed oil on a daily basis and never notified the exchange of the buildup of positions.

It has been testified that the Commodity Exchange Authority communicated with the officials of the exchange with respect to ex-pit transactions, which, by the way, Your Honor, are transactions that are executed outside the ring.

The Commodity Exchange Act requires all trades to be competitively executed by public outcry; that is, people stand down in a ring and offer to buy and sell, and the price at which the merchandise changes hands is determined by public outcry. Ex-pit transactions are an exception to this rule and are permitted under certain circumstances, that is, people are permitted to execute trades not by public outcry when they involve merely a change in the form of ownership or where they involve a trade in connection with a cash transaction, not just a trade of a futures contract, but where you actually intend to buy or sell a cash commodity, and at that point a noncompetitive or a nonpublic outcry trade is prohibited.

That these affect the price, however, of public trades or of trades at the ring has also been demonstrated by testimony given in 21(a) examinations taken by the Trustee.

Further, however, as to governmental involvement, it has been testified to that as early as August or September of 1963 an official of the Produce Exchange expressed his concern over the market to an official of the Commodity Exchange Authority who indicated that the Authority was also concerned and was watching the situation; that the Commodity

Exchange Authority furnished the exchange with information disclosing the positions in cottonseed oil on November 14th, but that prior thereto, however, it had refused to furnish similar information, although requested to by the exchange.

That the Administrator of the Commodity Exchange Authority had at least three conversations with officials of the Produce Exchange on November 14th, 15th, and 18th, 1963, and that each time the Authority recommended that the market in cottonseed oil be closed.

That the Administrator of the Authority was kept advised as to actions taken by the Exchange during the crucial period.

That the Administrator of the Authority and the Under Secretary of Agriculture were concerned about a corner on the Exchange and what action would be taken by the Exchange.

And that the Authority personnel were at Allied offices during the week of November 11, 1963.

This, Your Honor, it is submitted, shows the extent to which the Government was involved in the instant matter if involvement is, in fact, significant. But, as is shown by Rosee, involvement is only significant in the light of the claim of governmental privilege, which has been expressly disclaimed here.

Absent that, the test is really whether or not the documents are prohibited, which Rosee says, (a), that production in response to a subpoena is not a publication within the meaning of the Act; and, more important, the Secretary cannot rely upon the prohibition of Section 8 when he concedes that under his own discretionary authority he could publish these documents here.

The documents are essential to the Trustee's determination of claims that may be vested in the Bankrupt. There is no question that there was a failure to exercise regulatory responsibility in 1963. The evidence which is necessary to prove that, however, is an entirely different question; and this is what must be obtained from the records of the Department of Agriculture: the trading records which show what each person did on each day during the periods involved, what his positions were, long or short, how they changed each day, who was trading for who, and what each was doing; and other records showing what information the Produce Exchange had as to what the market was all about. As I say, there is no question but that causes of action are vested here. The question merely is the evidence necessary to prove them and as to another claim, as to precisely who was involved.

On this basis, Your Honor, the Trustee submits

that the subpoena is reasonably circumscribed in view of the complexities of the instant bankruptcy and that good cause has been shown and that the documents are not prohibited from disclosure by Section 8 of the Commodity Exchange Act, and that there is no basis for the Secretary's refusal to produce these documents in response to a subpoena duces tecum.

THE REFEREE: I assume you want to respond.

MR. DROGULA: I can do so very briefly.

THE REFEREE: I was going to say, if you want time, we can recess now for lunch; but if you want to finish quickly, why, we can wait.

MR. DROGULA: I can do it in fifteen minutes or less.

THE REFEREE: You would want some more time?

MR. DROGULA: Yes.

THE REFEREE: About fifteen minutes?

MR. DROGULA: Yes.

THE REFEREE: All right.

MR. DROGULA: I would like to say at the outset that the premise which the Trustee is apparently proceeding upon is that the production of these daily reports filed with the Commodity Exchange Authority do not contain trade secrets because the tradings and the business transactions



are closed. This is entirely false. We have nothing from the Trustees to support it, other than counsel's ipse dixit. On the other hand, we have an affidavit, which is a matter of record from the man who should know, that is Mr. Alex Caldwell, who is Administrator of the Commodity Exchange Authority. He has set out at length in paragraph 7 of the affidavit just how production of these traders' reports, even though they are two, three, four, or five years old could be extremely damaging to these traders on the Exchange.

If I may read very briefly what Mr. Caldwell has said:

"Public disclosure of the business transactions of traders on the commodity markets could be extremely damaging to the traders concerned, especially those who merchandise, store, or process such commodities and use the futures markets to 'hedge' their positions in the cash commodities."

He then goes on to explain this statement by saying:

"A disclosure of the names and addresses of 'hedgers' and their transactions would reveal to their competitors the extent of their involvement in merchandising, storing, or processing a commodity because of the usually close relationship between the futures

position and the total volume of their actual commodity operations, e.g., inventory holdings. It would disclose to competitors the pattern of trading followed by the trader and serve as an indicator of the normal trading that could be expected to be done by such a trader in the future."

Now, Mr. Caldwell has been in this field for years, and he knows, as I would think the Trustee would know, that even though the particular transactions are closed, you can always tell by looking at these past reports, be they two years old or longer, the pattern of trading which a particular trader engages in and you can profit from this by this knowledge.

Now, it is because of this and because of the very serious injury and the exposure of these trade secrets and business transactions that we say these reports should not be produced, particularly, it should be apparent from the Trustee's presentation, that they agree that the vast number of traders on these exchanges, particularly the little traders, are completely innocent of any wrongdoing, assuming anyone is guilty of any wrongdoing, which I might say is greatly doubtful by the presentation that has been presented. Certainly those people who are guilty of no misconduct, who have engaged in no manipulation, should not have their private

trade secrets and business transactions exposed in a proceeding such as this just because the Trustee thinks it would be nice to look at them and they would be useful in helping him reconstruct the entire picture of the market during that period. We frankly think this is unthinkable, that these innocent traders would have their reports disclosed at the same time.

Now, I would like to point out that the Trustee is apparently of the opinion that the public interest is not really a great matter to be concerned with here, because he has passed over it almost completely ignoring it.

He is also of the view that apparently a claim of privilege is essential before the public interest can be presented in any meaningful form. This, of course, is completely wrong. We have pointed out the great public interest in protecting the confidentiality of Government documents. We have pointed to Judge Sirica's opinion. There was no claim of privilege in the Westinghouse case; but, nevertheless, Judge Sirica said that no investigation reports would be produced, that cooperation with the Federal Bureau of Investigation, which, I might add, performs the same function for the Department of Justice that the Office of the Inspector General provides for the Department of Agriculture, that cooperation with that agency required that its investigation

reports not be produced. Judge Sirica specifically stated that the opinions and thoughts and viewpoints of the Federal Bureau of Investigation were certainly in no way essential for the preparation of the plaintiff's case.

We have also pointed out that documents which are in use by the Federal Government in investigations into possible violations of Federal law are not subject to production under Judge Holtzoff's opinion in the Capitol Vending case. This argument has not been responded to.

We have mentioned that great quantities of these documents are the work product of attorneys in the Department of Justice. This certainly is an important public policy consideration which is in no way dependent upon a form of claim of executive privilege. This has not been responded to.

In connection with the burdensomeness and oppressive point, the Trustee has not attempted to in any way discredit our claim of the volume of work and the volume of money that would be required to comply with this subpoena. Indeed, they have added substance to our claim that it is burdensome and oppressive by saying that even if we were to give them the keys to the kingdom and say roam around and investigate at will it would take them a month, at least, to review the documents contained in only the first three paragraphs of the nineteen-paragraph subpoena. They have not mentioned

whether or not they would be willing to defray the expense, although as I mentioned in my original presentation, this would be somewhere between ten and twenty thousand dollars.

So, in short, we think that you just can't ride roughshod over the public interest. Certainly it would be nice for the Trustee if he could route around in the Government's files at will and see who did what when, but you have to balance that against the injury to the traders on the commodity exchanges and to the Government in having a roving commission, as Judge Dawson put it, probing through the files.

Now, I did not mean to keep track of counsel, but he used the word if in his presentation more than thirty times, and I think that characterizes the Trustee's entire position in this matter. Notwithstanding that they protest that there is no question but that we have a claim, it seems perfectly clear by what has been said here, and I won't burden the point, that whether or not they have a claim depends on what they find. You don't have a claim in a lawsuit unless you can support it. And they say they know who, and then on the other hand they do not know who. They must identify the potential defendants.

Now, we do not feel that any substantial showing

has been made to anywhere near approximate the type of situation that you had in the Westinghouse against City of Burlington case. There you not only had an existing legal action but you had a specific issue whether or not evidence was in the files of the Department of Justice which would substantiate a particular legal defense; and although portions of the Westinghouse case have been read at length by counsel, nevertheless the net result of that case which was culminated in Judge Sirica's decision only last October was that the petitioner there got a very small percentage of the documents as to the informers who had voluntarily identified themselves and thereby caused the informers' privilege to evaporate. Judge Sirica flatly held that in balancing the convenience and necessity of the various competing interests, he had to hold that the great public interest in maintaining inviolate the confidentiality of Federal files outweighed the need of the plaintiffs for production of the documents. He also specifically said in that case that the fact that it might be more expensive and more troublesome to obtain the documents from an available alternative source did not excuse the plaintiffs from pursuing that remedy.

Now, I would like to also touch upon, and I am going to keep this quite brief, there seems to be some suggestion by the Trustee that there is an inconsistency in the Government's

position, because we say on the one hand that documents covered by Section 8 are not subject to production while on the other hand we say that we have discretion to exercise as to whether or not those documents will be produced. However, a careful reading of the statute and the interpretation of the Secretary of Agriculture will reveal that there is no inconsistency here at all.

Under Section 8 and under the 1947 amendment, which is 7 U.S.C., Section 12-1, the Secretary does have certain discretion to publish information relating to matters under inquiry; but if he elects to do so, he must make this information available to the public generally. That means that if we made this information in this subpoena available to the Trustee it would be incumbent by law upon the Secretary to make the identical information available to the public generally. We would have to publish it. And, of course, in view of the fantastic volume of documents called for by the subpoena, it would be an incredibly burdensome and costly venture if the Secretary of Agriculture were required to make these public generally.

Furthermore, there is no public interest requiring this production, because as we have pointed out in this case, and notwithstanding the Trustee's presentation, they could go to the files and records of those people who they knew are the



ones suspected of occasioning this loss and obtain this information from them. I won't belabor this point, because Mr. Caldwell's affidavit goes into great detail as to why the Secretary has not exercised his discretion in this case. But the interpretation of the Secretary of Agriculture is that having exercised his discretion not to make these documents available, then the full impact of Section 8 comes into play and these documents are not subject to production.

Now, we do not deny, as I tried to quite candidly admit in my original presentation, that the Roscoe case is squarely against us on the proposition of whether or not documents covered by Section 8, and which are ordinarily confidential, may be subject to production under the Federal Rules of Civil Procedure. However, we pointed out that counsel has not to this point at least taken issue with the point that this rule is squarely directly opposed to the rule in this district as announced by both Judge Youngdahl and Judge Keech.

Furthermore, I don't think that the Trustee can just wave his hands at this subpoena and say, "Well, clearly the Roscoe case requires production here." There is no faint resemblance between this subpoena and the subpoena involved in the Roscoe case. In the Roscoe case there was a legal action pending. Two employees of the Government were named as

defendants and the court said to the Secretary, "We can only determine the actions of these two defendants by examining your records and I am not going to let you draw a cloak of secrecy here."

Now, the Trustee has agreed so far, at least, as their potential or possible claims against the Commodity Exchange Authority or any employees of that authority, that that is speculative. While he has insisted that he has a claim under the antitrust act and he has a claim because of breaches of duty on the part of the commodity exchanges, he at least has admitted that it is speculative as to the probability of any claim being against the Commodity Exchange Authority. But it seems to me that the Trustee in this case is in the role of any would be litigant. He thinks he has a claim to sue somebody. Having a few cases which sketch out a legal theory is not a claim, and the fact that something happened on the commodity exchange markets is not a claim. And they say there is no reasonable reason why that could have happened and that we assume from that that something illegal happened. That is not an adequate basis, that is not sufficient particularity to justify a wholesale disclosure of Government files. Because, after all, reading through the cases that we have cited in our memorandum, the court at in Denver and the court in the Rogers case have all said that it is a pretty

strong step when you tell a large Government agency that you have to open your doors and expose all of your documents and records. And in the local 69 Hodcarriers case which we cite in our brief, there was a subpoena which was not one percent as broad as the present subpoena, and the court in that case quashed it and said that it would not allow production in that case. And the reason the court gave in that case is particularly applicable to the case involved here. He said, and I am quoting, "It is the view of the court that Federal discovery processes are not intended to require such wholesale disclosure of Government memoranda, reports, communications, and statements as is contemplated under the terms of this subpoena."

And if Your Honor will examine the subpoena in that case, you will see that it was by comparison extremely specific.

Now, I would also like to mention that the fact that this is a Rule 21(a) proceeding does not call for any greatly different results. We noticed that the Trustee has cited in his brief some cases, one 1899 and another one in 21 Federal Supplement, I believe it was, to the effect that Rule 21(a) examinations are very broad, and we certainly have no dispute with that as a general proposition. However, I would be reluctant to accept the proposition, since no authority

for it has been advanced, that this examination is broader than the liberal rules of discovery allow. I think it would be particularly offensive to suggest that this court under the Federal Rules of Civil Procedure somehow has less authority to order discovery than under Rule 21(a) proceeding. Therefore, I think the test which this subpoena must meet is whether or not it is objectionable under the Federal rules.

Now, as we have said, the interests of the creditors of this Bankrupt are certainly important. We recognize that. In the Westinghouse case it was said that the Government has a great interest in making documents available to litigants to help them in their private lawsuits. And I might say that we have sat down with counsel for the Trustee, and we have a rather elaborate list of documents that we agreed to produce. We have given instructions to members of our staff to make these documents available. Whether the Trustee has availed himself of this opportunity to examine them, I don't know. But these are private interests. And you cannot wave your hand at the public interest and say that this must give way because of the great debacle on the commodity exchange markets when all you have to support that are inferences, insinuations, and innuendo. I don't think it is at all clear that they have a claim. I don't think it is at all clear that they would ever have a claim. And I don't think that a supposed claim

or possible claim justifies the reality of the situation.

Again, we have not filed a claim of executive privilege in this proceeding. We have not done so because it is the policy of the Government not to claim executive privilege when it has available defenses short of privilege. This is a policy which is rooted in wisdom, because the head of any agency who is a member of the President's cabinet should not cause a confrontation between the executive and the judicial branches of the Government if there are strong and compelling differences short of privilege. If for some reason the defenses we have presented are not adequate, then we may be forced to consider filing a claim of executive privilege. At that point, I might say, as we mentioned in our memorandum, that that would make it dispositive, because the Supreme Court has held in the Reynolds case that when the head of an important or any Government agency makes a claim that production of certain documents in Government files would be inimical to the public interest, the court will accept that claim without question if the documents are available from alternative sources. In the Reynolds case the Supreme Court made that statement. They made the statement that in that case, as here, there was an alternative method whereby the party seeking the documents in the Reynolds case either could or may have been able to obtain the documents.

In that case the Supreme Court said there was no need for a showdown on the question of executive privilege since there was no showing of a compelling necessity.

Now here we don't think that we should have this immediate, complete, total type of discovery. As I mentioned, you don't eat an apple by swallowing it whole. I know that is a homely expression, but it is very true. You approach this and see what you need, because in approaching this step by step, in interviewing these potential defendants in the New York proceeding, you could greatly minimize the burden on the Government; and perhaps it would not be necessary at all to obtain these documents; but even if it was necessary, it would then be possible to state the documents needed with sufficient particularity to greatly reduce the burden.

Now, in conclusion on this point, I would like to say that we strongly disapprove of the idea that all you have to do to get into court on a subpoena is to file a broad, sweeping subpoena asking for the moon and then say, well, we are willing to settle for less. As Judge Keech said, when you are faced with that kind of a subpoena, you throw it out. The proper procedure, I think, would be for this subpoena to be vacated and for the Trustee to attempt to obtain what documents are available from these other sources and then, if necessary, come back to the Government and say,

"Well, now, we are in a position to tell you what we need."

The idea that the failure of this subpoena would cause the Trustee's action to crumble or abate certainly cannot be substantiated. I think it is clear that if this subpoena is quashed special counsel for the Trustee will continue in their efforts to arrive at a solution to this question, and I have no doubt that it can be done.

But, in any event, we do not feel that on the basis of the showing made here, which I might add is substantially just the argument of counsel, that there is any need for production.

I regret having taken this long. I said I would only take fifteen minutes. But we respectfully submit that this subpoena should be quashed.

MR. LOBELL: May we have a recess before continuing?

THE REFEREE: Yes, until about quarter after two.

(The Court recessed at 12:17 p. m. and reconvened at 2:20 p. m.)

THE REFEREE: You may proceed.

MR. LOBELL: Having had the opportunity to reflect on the matters during the recess, I think that perhaps the best way of answering the Government's contention would be to demonstrate that this subpoena cannot just be taken as a



whole, that it must be considered as to each paragraph and what the needs of the Trustee for the documents called for in various paragraphs of the subpoena are. To that extent, I will also show the claims to which the documents relate.

I think that paragraphs 1, 2, and 3 of the subpoena itself, as we have all recognized, constitute the bulk of the production which is called for.

Paragraph 1 of the subpoena calls for the period January 1, 1960, to December 31, 1963, all series 900, 1000 and 1100 forms filed with the Commodity Exchange Authority by clearing members of contract markets pursuant to Section 16.00 of the Regulations of the Secretary of Agriculture under the Commodity Exchange Act or, in lieu thereof, the reports regarding clearing members filed with the Commodity Exchange Authority by the contract markets themselves during the aforementioned period.

Paragraph 2 calls for the same period, for the period January 1, 1960, to December 31, 1963, all series 901, 1001 and 1101 forms filed with the Commodity Exchange Authority by futures commission merchants and foreign brokers pursuant to Section 17.00 of the regulations referred to in paragraph 1 above, and all forms designated as CEA Form 102 filed by such persons during the aforementioned period.

Paragraph 3 asks for the period January 1, 1960, to December 31, 1963, all series 903, 1003, and 1103 forms filed with the Commodity Exchange Authority by traders pursuant to Sections 18.00 and 18.01 of the regulations referred to above and such documents as will indicate the identity of the reported accounts for which a code number was assigned as provided in Section 18.02 of the regulations.

These reports, Your Honor, in paragraph 1, call for reports on the relevant commodities indicating the trades and positions of clearing members for the relevant period.

The way the commodity markets are organized, a floor trader executes a trade on behalf of a particular broker. At the end of the day, the trades are cleared. If a broker himself is not a clearing member of the Exchange, it has to go through a clearing member. Each day a clearing member is required to file with the Commodity Exchange Authority a report indicating the trades that he has cleared during that day, for whom they were cleared, only brokers, however.

Paragraph 2 asks for reports filed by futures commission merchants -- these are the brokers themselves -- indicating what trades they have had.

And paragraph 3 asks for the same reports filed

by the traders themselves.

At this point we can note that, number one, small traders don't have to file reports. It is only those who are in a "reporting position," which at that time was having more than twenty-five contracts long or short, who have to file. Therefore, the question of small traders being reflected here is not present at all. Moreover, there is no question as to these documents of work product of an attorney. These are forms. They are forms filed with the CEA pursuant to the regulations contained in the Act. They are just a form that you fill out and indicate what your position was each day.

And as far as disclosing confidential information, we have said that the trades have been closed at least two years. In answer to that the Government has said, "Well, these would disclose what the trading patterns are." But there are two types of transactions, hedging transactions and speculative transactions. I think we are here concerned to some extent with hedging transactions. What these transactions are, as we tried to explain before, is that it is a way of protecting yourself against fluctuations in price. So if you have an inventory of oil, as it would be in this particular case, to protect against a decline in the market value, you sell a contract short. If the price then goes down, the value that your inventory depreciates you have gained by the money that

you have made on the decline in price in the futures market. On the other hand, if you have a forward sales commitment, as it is referred to, for example, you have contracted to something which would use oil and at a specified price, your price determination at that time was probably made on the basis of the prevailing market price at that time, so to insure or to lock in your profit you buy a long contract in that instance; and what the long contract is that someone is promising to give you delivery of the oil at that price; and in that way you protect against fluctuations in price. However, by assuming that these will disclose trade secrets, there is one flaw; and that is assuming that people engage in the same magnitude or the precise operations all the time. For someone who had an inventory position two years ago, there is no basis for assuming that his inventory position would be the same today.

So, therefore, by looking at how many short contracts he had two years ago as a hedge against inventory, his volume of business has changed. He may not have inventory for other reasons. He may be engaged on both sides of the market, that is, as both a processor who has inventory as a forward seller who would need it, and there is no basis for assuming that his operations are the same. So then that argument is not relevant either.

And as far as their being prohibited from disclosure under the law, I think we have dealt with that.

The only thing that then remains is whether or not these are necessary for the Trustee's investigation. Of course, we have pointed out that this is a 21(a) examination, and the object of a 21(a) examination is to enable the Trustee to inquire into whether there are any assets existing on behalf of the bankrupt. Included within that term are potential causes of action.

We have also stated that the contract markets under the jurisdiction of the Department of Agriculture are charged with the duty to regulate their markets. These reports will show what the market was during the relevant period and will be evidence to demonstrate that the contract markets involved did not properly discharge their regulatory responsibility. Only by putting together these reports can you determine whether or not there was a speculation in an evidentiary sense. In 1960 there were only 2,000 trades on the New York Produce Exchange as an average, but in 1963 Tino DeAngelis had 8,000 contracts all by himself. It is only by a comparison of what went on in the past and putting together what was being done that the responsibility of the exchanges themselves to regulate and, I should add, of the Commodity Exchange Authority, because the records do disclose, the testimony

discloses that the Commodity Exchange Authority was in communication with the contract markets involved; and that becomes significant. The Commodity Exchange Authority had these positions. Did they exercise their regulatory responsibility? It is only with these records that that can be determined.

Moreover, as far as the other cause of action to which we referred, these documents are also crucial. We have said that there would be a cause of action based on the downward manipulation which would be a violation of the antitrust laws. Well, without knowing exactly who did what, this cause of action cannot be asserted against anyone.

Now, also, the Government says we can get these from some place else. Number one, as we pointed out, there are no parties here. It is just a question of persons having knowledge or information. Number two, as far as getting it from someone else, the process that would have to be engaged in is staggering to the imagination.

As far as the Klebenow case is concerned and the parties named there, we will show this court that you can't get it from them, because the New York Produce Exchange which is a party to the Klebenow case does not have these documents. They are not a clearing member, they are not a

futures commission merchant, and they are not a trader and these reports are not filed with them. They are filed with the CEA. The same with the New York Produce Clearing Association. Merrill Lynch who is named in that case is only one broker and Bunge who is named in that case is only one trader. So that the reports that the Trustee is here seeking to enable it to make its determination in no sense can be obtained from the people who are involved in the Klebanow case. On the other hand, to find out who the traders were during that period would require this process. You can't just go to traders, because you don't know who they are. So what do you do first? You have to go to the clearing member. The clearing member only reports who he cleared for in the sense of the broker. So that still doesn't tell you who the trader is. You then have to go to all the brokers for whom clearing members cleared, and those reports will show what they did. They don't show who they traded for, who the customers were. How do you find out who the trader is without getting that from the Department of Agriculture? They are the ones who have who the traders were, and it is essential to see what these traders did.

Paragraph 4 of the subpoena calls for all documents which indicate, disclose, or otherwise relate to an investigation made by the Secretary of Agriculture pursuant



to Section 8 of the Commodity Exchange Act, during the period January 1, 1960, to December 31, 1964, with respect to market conditions in the cash and futures markets for cottonseed oil and soybean oil.

By Section 8 the Secretary of Agriculture is specifically authorized to make investigations with respect to market conditions and to publish that information. These documents, to the extent that they are made public, I think the Government has agreed to produce them.

MR. DROGULA: I would assume you have already looked at them.

MR. LOHELL: Paragraph 5 calls for documents relating to the cash and futures markets for cottonseed oil and soybean oil which were furnished by the Secretary of Agriculture pursuant to Section 8 of the Act to producers, consumers or distributors of these commodities during the period January 1, 1960, to December 31, 1964.

The same comments apply there.

I am sorry, but in discussing paragraphs 1, 2, and 3 one point which I failed to mention is that the 21(a) examinations which have been conducted in New York and Chicago of officials and knowledgeable persons on the Produce Exchange unequivocally demonstrate, whether you can characterize it as an insane market or an unusual market or a

unique market, that something was wrong; and because this something was wrong, we got hurt.

On November 14th when the Commodity Exchange Authority first recommended to the New York Produce Exchange that it close the market, the market was two cents higher than when they actually closed it on the 20th. That cost us twenty million dollars. Those, however, we can come to later on when we talk about the paragraph relating to the communications between the CEA and the Produce Exchange.

Paragraph 6 asks for all documents which indicate, disclose or otherwise relate to any investigation made by the Secretary of Agriculture or the Acting Administrator pursuant to Section 8 of the Commodity Exchange Act with respect to the operations of the Produce Exchange concerning transactions in cottonseed oil during the period January 1, 1963, to December 31, 1963, and the operations of the Chicago Board of Trade concerning transactions in soybean oil during the aforementioned period, including, but not limited to, any investigation concerning the actual or alleged failure of the Produce Exchange or the Chicago Board of Trade to prevent a manipulation of prices or cornering with respect to cottonseed oil and soybean oil.

Here again, Your Honor, these aren't work products of an attorney. These are investigative, factual reports of a

failure to regulate during the crucial period, January 1, 1963, to December 31, 1963, investigations by the Department of Agriculture to determine whether or not the relevant contract markets faithfully discharged their obligations under the act to regulate.

Again, these certainly cannot be obtained from any place but the Department of Agriculture; and, therefore, the Government's contention in that regard would fail in that paragraph as well.

Paragraph 7 of the subpoena asks for all documents which indicate or disclose the names, addresses, and amounts of cottonseed oil or soybean oil futures contracts purchased or sold by any or all persons trading in cottonseed oil on the Produce Exchange and/or soybean oil on the Chicago Board of Trade which were disclosed or made public by the Secretary pursuant to Section 8 of the Act and all documents which indicate or disclose the persons, firms or organizations to which such information was disclosed.

Here, too, the Government has no problem in producing these, since we are only asking for documents here of a public nature, documents which the Secretary did in fact make available during the period under the authority contained in the Act. The relevance of them is obvious. Who has information?

Paragraph 8 calls for all documents which disclose or reflect any information concerning the cash and futures markets for cottonseed oil and soybean oil, any transaction or market operation with respect thereto, or any person, firm or organization trading in such commodities, which was communicated or disclosed during the year 1963 by the Secretary of Agriculture, the Act Administrator or any other officer or employee of the Department of Agriculture pursuant to Section 8a(6) of the Act or Section 1.5 of the Regulations, to the Chicago Board of Trade or the New York Produce Exchange or any committee, subcommittee, officer, director or other employee thereof; and all documents which disclose or indicate the substance of any discussion, whether written or oral, between or among any officer or employee of the Department of Agriculture and any officer, director or other employee of the Produce Exchange or the Board of Trade with respect to the information communicated or disclosed in the manner described above.

This information, the information sought in that paragraph, would be essential to the Trustee so that he could evaluate the actions taken or not taken by the Produce Exchange and the Board of Trade in the light of information which it would have obtained from the Secretary of Agriculture.

Section 8a(6), it will be recalled, specifically authorizes the Secretary of Agriculture to disclose to the proper committee of a contract market information it has exclusively within its possession relating to the discharge of that contract market's obligation to regulate.

In order to judge whether or not a contract market did in fact properly regulate, we must know what information was communicated to it by the Department of Agriculture. If the Board of Trade and the Produce Exchange had the same information as the Department of Agriculture did, a much greater basis for their failure to regulate is apparent. However, we will remember that there is testimony which has been given in 21(a)'s that the Produce Exchange asked for positions at one time and that the Department of Agriculture refused to give it to them. This, we submit, must be determined from the records of the Department of Agriculture. In serving a subpoena on the Produce Exchange and the Board of Trade, no documents of this character, with the exception of one under date of November 14th, was disclosed. If there are documents of this character, they are highly significant to the Trustee and, presumably, the Department of Agriculture would be the only one who has them.

Here, too, we are not talking about the work product of an attorney; we are not talking about protecting little

traders; we are not talking about documents that we can get from someone else.

Paragraph 9 of the subpoena asks for documents which indicate, disclose or reflect recommendations, proposals, or suggestions concerning the cash and futures markets for cottonseed oil and soybean oil, or transactions or market operations with respect thereto, or persons, firms, or organizations trading in such commodities, made or transmitted during the year 1963 by the Secretary of Agriculture, the Act Administrator, or other officer or employee of the Department of Agriculture, the Chicago Board of Trade or the Produce Exchange or any committee, subcommittee, officer, director, or other employee thereof; and documents which disclose or indicate the substance of any discussion, whether written or oral, between any officer or employee of the Department and any officer, director, or employee of the Produce Exchange with respect to the recommendations, proposals or suggestions.

Here, too, we have mentioned that on at least three occasions the Department of Agriculture recommended to the New York Produce Exchange that it close the market. If the market had been closed by the Produce Exchange on November 14th when this was first recommended by the Department of Agriculture, we wouldn't have lost a penny. We

lost twenty million dollars between the 14th and 20th of November.

Why the Produce Exchange refused to listen to the recommendations, what the reasons were that prompted the Department to make these recommendations, how it saw the market, this is crucial in determining whether or not the Exchange properly discharged its regulatory responsibility.

Paragraph 10 of the subpoena calls for documents which indicate or disclose communications during the period January 1, 1960, to December 31, 1963, between the Secretary of Agriculture, the Act Administrator, or any other officer or employee of the Department of Agriculture and Anthony DeAngelis or any other officer, director, or employee of Allied Crude.

Your Honor, in documents produced pursuant to subpoenas which were served by the Trustee, it became apparent that the head of the Foreign Agricultural Service of the Department of Agriculture met with certain financiers and people who were doing business with Mr. De Angelis in an attempt to solicit the cooperation of those companies to stop doing business with DeAngelis. Apparently Mr. DeAngelis's problems arose because in 1960 he had a contract for fifty million pounds of oil with the Spanish Government; and when the Spanish Government reneged, he had purchased all of this



oil to deliver; and he was stuck with a fantastic inventory position. As we have pointed out, if the price of futures had gone down, his inventory position would be devaluated. Mr. DeAngelis, it will also be remembered, obtained his financing in one way, financing inventory, by warehouse receipts; and the financing was keyed to the market price of the oil. Therefore, it was absolutely essential for Mr. DeAngelis to maintain the price of futures. And how do you do it? You buy, just like you buy in the stock market. To make a price go up, you buy and you buy and you buy. So for four years Mr. DeAngelis bought and just kept buying and buying more and more. Now, for four years nobody put any great downward pressure on the price, and he was permitted to buy. The market was chaotic; it was incredible. But no one did anything about it.

On November 15, 1963, all of a sudden, the price starts going down. There was no reason. It just starts to go down. The Department of Agriculture says close the market. The Produce Exchange doesn't close it on the 14th. And on the 15th we lose ten million dollars. On the 15th the Department of Agriculture again talks to the Produce Exchange, close the market. They don't close it, nine million dollars on the 15th. The 16th and 17th are the weekend. On November 18th another conference with the

Produce Exchange, close the market. They don't close it -- twelve million dollars. On the 20th they close it. We were out of money by then. That is why they closed it. The New York Produce Exchange was advised by Haupt that it could no longer meet the margin calls. The poker game was over. We couldn't pay any more, you close it, the shorts take their money and go home.

Paragraph 11 of the subpoena calls for documents which indicate or disclose communications, any communication during the year 1963 between the Secretary of Agriculture, the Act Administrator, or any other person, firm, or organization, other than a contract market or representative thereof, with respect to the cash and futures market for cottonseed oil and soybean oil, any transaction or market operation with respect thereto, or any person, firm or organization trading in such commodities.

Here what we are seeking is a basis for determining whether anybody had special information which caused them to do what they did. First, we have got to see what they did, and now we want to also know, Did they have any special information? If the Department of Agriculture never made any communications, there is no problem. All we want to know is, Did anybody act with special information? Was there insider information here? Because under the law as

it exists, what might be a reasonable action of an exchange in regulating or not regulating the market if done in bad faith is converted into an antitrust violation. And the Exchange, we submit, was run by its executive committee and its board of managers, and it is essential to determine whether or not these people had any information that the public at large did not have.

Paragraph 12 of the subpoena calls for documents which indicate, disclose, or reveal the facts or circumstances concerning investigations of the Board of Trade or the Produce Exchange for failing to prevent a manipulation of prices or cornering of any commodity by the dealers or operators on the contract markets, or suspensions or revocations of the designation of the Board of Trade as a contract market pursuant to Section 6(a) of the Act.

What is here involved, as has been mentioned by the Government in its brief and by the Trustee in his memorandum, is for failing to prevent a manipulation of prices or cornering the designation of a contract market as a contract market, in other words, allowing people to trade thereon, can be revoked by the Secretary of Agriculture.

What we are asking for here is, Did you investigate the Board of Trade and the Produce Exchange for such activities during the period 1935 to 1963? Now, that map

seem like a long period, but I can't believe that the Administrator of the Commodity Exchange Act doesn't know whether or not there were manipulations or corners during this period. You don't have to ask the head of the New York Stock Exchange whether there was a crash in 1929. He doesn't have to go through every record to know about black Friday. And we submit that if there were any manipulations, any cornering which were investigated, this is not a tremendous job to put him to. Again, we are not asking for work product here. We are asking for factual, investigative reports which will enable us to judge the conduct of these markets during our period, 1963, in the light of what other markets did in similar situations. How then can you determine whether or not action was reasonable? If you have a similar instance, a precedent, it gives you a basis for coming to a conclusion. And if the Department of Agriculture investigated for it and it thought it was a manipulation, this gives a basis for comparing.

Paragraph 13 of the subpoena calls for documents which indicate or disclose facts and circumstances concerning complaints served upon the Secretary, rather, by the Secretary pursuant to Section 6(b) of the Commodity Exchange Act upon any person other than a market charging that such person has manipulated or attempted to manipulate the price of any

commodity traded upon the Board of Trade or the Produce Exchange; and documents indicating or disclosing the outcome of such complaint including suspension or revocation. These, as the Government has pointed out, would be public; and there is no problem there.

Paragraph 14 calls for documents which concern crop or market information relating to cottonseed oil or soybean oil or which concern conditions affecting or tending to affect the price of such commodities which were furnished the Commodity Exchange Authority during the year 1963 pursuant to Section 1.40 of the Regulations.

Here what is asked for are documents which the traders, futures commission merchants, clearing members, or anyone dealing in the commodity furnished the Authority as required by the regulations tending to indicate what their opinion of the market was and what would happen so that you can judge their conduct and see in fact whether there is any reasonable business ground for their actions. Here again, of course, there is no question of work product of an attorney. We are not talking about little traders.

Paragraph 15 of the subpoena asks for all documents which indicate or disclose any information concerning the execution, in soybean oil or cottonseed oil futures, during the year 1963, of transactions commonly called "pass-outs"

and which information was furnished to the Authority by any member of the Board of Trade or the Produce Exchange pursuant to Section 20.00 of the Regulations, or documents containing such information which was furnished by the clearing members.

Pass-outs, Your Honor, are transactions which are unclear. As we have mentioned, the way a transaction is usually effectuated in commodities is by public outcry. There is a pit or a ring. I stand up and offer to sell, someone buys, and vice versa. Certain transactions, however, under certain circumstances, among an individual need not be transacted in this way, and they are not cleared at the end of the day. They are not matched by the clearing association. Such transactions, however, do affect price, because they are volume. It isn't necessarily prohibited, but by generating volume, you can generate price. And all we are asking for here is to find out whether anybody engaged in that sort of artificial activity during the crucial period of time.

As to paragraph 16, we have no dispute. It relates to the documents of the Bankrupt itself which may have been taken from us. When this thing first happened, it was a catastrophe of enormous magnitude, and there are all sorts of people in Haupt's records and in De Angelis's files and, quite frankly, we don't know what records we had. The Trustee was not appointed until some time after the bankruptcy, after

the collapse, I should say, and we would like to know what records were taken from us.

Paragraph 17 asks for documents which contain information concerning complaints or intelligence received, investigations made, or a course of conduct or regulatory action adopted by the Secretary and the Inspector General into the operations and affairs of Haupt or any of its partners and employees, exclusive of those documents required to be produced under other paragraphs of this subpoena.

Here we are asking for investigations into Haupt's affairs. The reason for this, Your Honor, relates to another case which was filed by the Trustee. Haupt had what is referred to as a broker's blanket bond. One of the provisions of the bond related to dishonesty or misrepresentations on the part of employees. There has been a case instituted by the Trustee against the issuers of these broker blanket bonds in an attempt to recover on the basis that some of Haupt's employees in its dealings with Allied may have transgressed their authority.

This paragraph only seeks documents which relate to investigations by the Department of Agriculture or intelligence received relating to any activities of Haupt itself.

Paragraph 18 of the subpoena asks for documents which contain information concerning complaints or intelligence



received concerning investigations made or reflecting a course of conduct adopted by the Secretary with respect to Allied into the operations and affairs of Allied Crude Vegetable Oil Refining Corporation and persons affiliated with Allied, including Anthony DeAngelis, Gerald Gittleman -- Allied's trader, I may say -- Benjamin Rotello and Leo Bracconeri, who were also Allied personnel.

Again, what is sought here is to look into what did the Government know about Allied? Should the Government have exercised any authority here? As we remember, it is not only the contract markets who are required to regulate, but the Government had a vital role to play here; and what they knew about Allied might furnish a basis for determining whether or not their actions were reasonable.

Paragraph 19 of the subpoena asks for documents which contain information concerning complaints or intelligence received, investigations made or reflecting a course of conduct with respect to certain named persons, including Bunge, American Express, American Express Warehousing, Harbor Tank, J. R. Williston & Beane and D. R. Cosenzo. Each of these persons was intimately related with Allied. Bunge Corporation was its principal financier. Bunge Corporation was also the person who the Administrator of the Foreign Agricultural Service met with in an attempt to

solicit Bunge's cooperation in refusing to deal with Allied. American Express and American Express Warehousing, their role in this has now become legend. We have got 280 million dollars worth of phantom oil. Haupt lost twenty million dollars in commodities, eighteen million dollars in forged warehouse receipts, and many other people were injured in warehouse receipts as well. And what this does is an attempt to find out what the Government has with respect to investigations into American Express and why this occurred. Similarly with Harbor Tank, which is another storage company. Williston & Beane and Comenzo were other brokers for DeAngelis, and what is sought there is documents relating to investigations of their activities.

In short, Your Honor, each paragraph of the subpoena is necessary for the Trustee's determination here.

A number of other points can be very briefly dealt with as far as the Government's contentions. This is a 21(a) proceeding, and a 21(a) proceeding is to give the Trustee power to summarily inquire into the existence of assets, and its scope and latitude is a wide one. That doesn't mean good cause has not to be shown. It does. But we submit that we have more than shown that.

As far as the costs of advancing these, this ancillary proceeding was authorized by the Referee in

Bankruptcy in New York, recognizing that the reasonable costs of production have to be made, have to be advanced on the part of the Trustee. Significantly, however, the costs relating to the trading reports as estimated by Mr. Caldwell himself of producing those are only about six hundred dollars. This ten to fifteen thousand dollar figure comes from Mr. Condon's affidavit, talking about he would have to search all the files of different agencies of the Government and then make a line by line determination of whether or not the material is privileged. But if the material is not privileged and subject to Section 8 of the Act, no line by line determination is necessary and a basis for much of that cost disappears.

Finally, it is clear that what the Secretary and the Department is trying to do here is not give any documents. That becomes clear from its statement that if its defenses here aren't upheld it will consider a claim of privilege.

This motion was a motion to quash or modify. Now it becomes a motion to quash the whole thing. Not one document here is offered. A claim of privilege will be considered in the event that the Department's defenses here are not sustained.

The Government cannot have any difficulty in understanding the documents that are sought, because the subpoena is drafted in the very language of the statute

requiring the people to furnish this information; but if they can't identify the documents, the Trustee will be more than happy to help them identify them with greater particularity.

The forms themselves, just pieces of paper under 1, 2, and 3 are in Chicago and in New York. I find it hard to believe that in this, the greatest single debacle in commodities futures trading ever to occur in the United States, when the same documents have been sought by different Government agencies, that the Department of Agriculture hasn't collected them in one place already. Certainly the trading reports are in Chicago, New York, and Washington. We are not asking them to bring them here or New York. We will go to Chicago, we will go to New York, we will come to Washington. We will look at them, we will analyze them, and that is all that is being required. These are pieces of paper that are centrally collected that are essential for our determination.

In view of that, Your Honor, we submit that this is not a burdensome or oppressive subpoena, that good cause has been more than shown, and that clearly production is not prohibited by Section 8 of the Act.

If a claim of governmental privilege is being considered, that is another question. But on the record as it

is now, there is no basis for the Secretary's refusing withholding of these documents.

At this point, Your Honor, the Trustee's presentation is concluded.

MR. DROGULA: I would like to make a few comments if you will bear with me, Your Honor.

THE REFEREE: Very well.

MR. DROGULA: I would like to say that we have now had the subpoena read to us twice practically line by line. But it really was not necessary to go to that trouble. We could have summarized it by saying, "Mr. Secretary of Agriculture, you will produce every scrap of paper in your possession relative to the Anthony DeAngelis affair." No matter how many paragraphs you want to break that down to, that is what it all adds up to.

Now, I don't think that any amount of breaking these documents down and discussing them and itemizing them ignores the fact that what the Trustee is concerned with here is only its interests. Even in his final summation, the Trustee has ignored the many important considerations of the public interest which we have mentioned.

Now, the Trustee here is adamant that it has a claim, but it is clear here that it has no claim or it wouldn't be looking for these documents. It says it has some

cases which set out a legal theory upon which a legal claim could be predicated. But the truth of the matter is that whether or not they have such a claim depends upon whether or not there was a manipulation on the market. Now, whether there was or was not a manipulation, they don't know. They have to say and satisfy themselves with saying there is no explanation for what went on during the market in that period. Therefore, we assume that there must have been a manipulation.

But in response to Your Honor's question, Could there not have been some other explanation for what occurred on the market during that period consistent with an explanation other than a manipulation? counsel said yes.

Now during the recess Mr. Caldwell, who is Administrator, of course, of CEA, brought to my attention that this market condition at that time was not restricted to the oil market. The same losses occurred on the soybean, rye, and wheat markets. And it is ridiculous to assume that all of this occurred as to Mr. De Angelis just because he happened to be involved in those markets.

There was a great deal of speculation during that period about the sale of wheat to Russia and other matters. And then the sales fell through, and the commodity markets reacted very unstably during that period.

But, in any event, what the Trustee is obviously

attempting to do, in the words of Judge Dawson, is have a roving commission wander through the files of the Department of Agriculture to see what it may have. But to this moment counsel has not responded to the argument that a great many of these documents, particularly investigation reports, are presently being used by the Department of Justice and by the Department of Agriculture. And Judge Hitzoff has squarely held that such documents are not subject to production.

He mentioned that several paragraphs of the subpoena did not relate to attorneys' work product until he got down to the paragraphs which do embrace attorneys' work product, and then he neglected to continue his recitation.

Paragraphs 17, 18, 18 and 19, particularly, embrace many documents that are covered by the attorneys' work product.

In short, here, we have the Government's interest in maintaining these documents against the Trustee's interest. And no matter what he says, these people who are suspected of occasioning this loss are the ones to get these documents free.

We respectfully submit that on the posture here no showing of good cause has been made and that the burden to the Department of Agriculture has not been rebutted.

So we rest, Your Honor.



THE REFEREE: I did not want anybody to go away feeling that they haven't been fully heard.

Did you have anything more you want to add?

MR. LOBELL: Just two points very quickly.

Number one, as far as the Government's statement that I said that what happened was consistent with other factors in the manipulation, I may have been unclear. What I meant at that point was that there may have been other reasons for the downward prices starting November 15th, 1963, other than a conspiracy; but as to the reason why the market was out of whack in 1963, there was a manipulation, and that the testimony that we have taken in 21(a) examinations clearly indicates that there was a manipulation that I said there was no other reason for.

That is all.

THE REFEREE: Gentlemen, I thank you. Each of you has presented your case, I think, as fully as possible. I am not going to insult you by attempting to give you a decision today, because it has undoubtedly taken you a long time to put this together; and I am not going to shoot from the hip and see what I can hit with a one shot.

There are quite a few problems that are raised in my mind. One is that we talk about public interest, and public interest to me has many facets.

So far as bankruptcy is concerned, we believe there is a public interest in any case that affects numerous people. I don't know how close we are to it in the Ira Haupt case, but I certainly suspect there are enough people involved in it to bring it into the picture of the public interest. I know in our own Caribbean Cruise Lines case here we have a great deal of public interest. At the same time there is public interest from the standpoint of the responsibilities that the Trustee owes and the responsibilities that the Government owes. I am not going to try to resolve those at this particular stage of the game.

I am also quite well acquainted with the Trustee's problems in matters of this kind. It is a rather frustrating position that he finds himself in. He is charged with certain responsibilities under the Bankruptcy Act. If he doesn't perform in accord with what the public again thinks, he can be pretty severely chastized for it. But other than in giving him the authority to proceed in some sort of an advisory manner by subpoena of witnesses, neither the Government nor the courts nor the Bankruptcy Act gives him any tools to work with. As a matter of fact, in many cases if the Trustee is to conduct the examinations that are considered necessary, he has to ask the assistance of people who are willing to work without hope of reward unless they

can recover some assets. So that he has a very serious problem there.

The Government's problem is equally serious. It can't be too freehanded in giving out information nor can it be too tight in giving out information. It has got to be regulated not only by rules that are in existence and the statutes but also by rules of common sense.

At the same time, we have in this case many persons who are entirely innocent of any connection with this case. What do we do to protect them? Is the public interest such that we sacrifice these innocent persons and drag them into it? Normally, that is not permitted under 21(a) examination. It has been held many, many times that the relations of the witness under examination with third parties who have no business dealings with the bankrupt is not admissible in 21(a) examinations. So we immediately run into the limitation of the scope. Along with it all, we have a very practical problem. Pushing aside all the legal problems, somewhere along the line, by some method, the Trustee has got to be able to perform his duty. Somewhere along the line, the Government can't sit back and under guises of technicalities cover up some wrongdoings which may not be brought to daylight by criminal prosecutions because they are not of a criminal nature but still should be made available to the

**Trustee.**

Now, in more cases than not, we can't force those problems to be resolved on a practical basis. We can only suggest that it be done.

I understand from the comments that were made at a previous hearing and the comments that were made today that some documents have been released to you. I wouldn't doubt for a moment that by proper consultation the Government wouldn't make others available to you with or without regard to the outcome of this proceeding here. I don't think that there is any agency of the Government that would want to conceal information that can be made available.

It is going to be maybe a week or two longer for me to put a memorandum together for you. I hope in that time that you will not abandon the idea completely and that you might be working together from a practical point of view to see what assistance can be given the Trustee within the area that you can operate. I think that has to be done by the Government without regard to the outcome of this proceeding.

So that the record will leave us so that we will know where we are going, I will take it under advisement; and so far as the 21(a) proceeding is concerned, I will continue that subject to my call so that it will still be

a matter that may be undertaken depending upon the outcome of this proceeding.

Thank you, gentlemen. I enjoyed listening to you.

We stand adjourned.

(Thereupon, the hearing was concluded at 3:30 p. m.)

CERTIFICATE OF COURT REPORTER

I, Harry Kaitz, do certify that the foregoing is the official transcript of the proceedings in re:  
In Bankruptcy No. 70-65, January 20, 1966.

Harry Kaitz

[CAPTIONED OMITTED]

MEMORANDUM OF REFEREE IN BANKRUPTCY

(Motion to Quash Subpoena Duces Tecum)  
(Filed April 22, 1966)

This matter came on for hearing upon the motion to quash, or, alternatively, to modify a subpoena duces tecum, filed by the Secretary of Agriculture, Orville L. Freeman, in connection with an order directing him to appear for a 21a examination in the above bankruptcy proceeding.

The petition for the 21a examination of the Honorable Orville L. Freeman alleges that the bankrupt is a brokerage firm which suffered losses in excess of twenty million dollars by reason of the losses of its customer, Allied Crude Vegetable Oil Refining Corporation, in the cottonseed oil and soybean oil commodity market; that in order to discharge the Trustee's fiduciary responsibility to investigate the acts, conduct and property of the bankrupt, it is necessary that the Trustee examine certain documents set forth in a schedule attached to the petition; that all of said documents are within the custody and control of the Honorable Orville L. Freeman, Secretary of Agriculture; that the Trustee has requested appropriate officials of the Department of Agriculture to permit examination of the documents so described, but said request has been refused; that the Trustee is seeking to determine from this examination whether a cause

of action exists in the bankrupt arising from losses in the cottonseed oil and soybean oil futures market; and that the documents to be examined consist of trading reports relating to trades in cottonseed oil and soybean oil futures, investigative reports of market conditions, and communications between the Department of Agriculture, Commodities Exchange Authority, Chicago Board of Trade and the New York Produce Exchange relating to the aforesaid commodity markets.

The schedule attached to the petition consists of some eight pages and relates to nineteen separate classifications of documents, some covering a period of time from January 1, 1935 to December 31, 1963, some from January 1, 1960 to December 31, 1963, some from January 1, 1960 to the present, and some for the year 1963. The types of documents referred to include forms filed with the Commodity Exchange Authority by clearing members of contract markets; forms filed with the Commodity Exchange Authority by futures commission merchants and foreign brokers; forms filed with the Commodity Exchange Authority traders; a general classification of other documents in connection with the foregoing; documents relating to any investigations made by the Secretary of Agriculture with respect to market conditions in the cash and futures markets of cottonseed and soybean oil; all documents relating to the cash and futures market for cottonseed and soybean oil which were furnished by the Secretary of Agriculture



to producers, consumers or distributors of those commodities; all documents which relate in any way to any investigation made by the Secretary of Agriculture or the Act Administrator with respect to the operations of the New York Produce Exchange concerning transactions in cottonseed oil and the operations of the Chicago Board of Trade concerning transactions in soybean oil; all documents which disclose the names, addresses, and amounts of cottonseed or soybean oil futures contracts purchased or sold by any or all persons trading in said oils on the New York Produce Exchange or the Chicago Board of Trade which were disclosed or made public during the year 1963; all documents which disclose or reflect any information concerning the cash or futures market for such oil; and other described documents. The subpoena duces tecum called for the production of the same information.

The Secretary of Agriculture moved to quash, or, alternatively, to modify the subpoena duces tecum on the grounds that it is burdensome and oppressive; that it is too broad and sweeping in scope; that there is no good cause for production of the documents sought; that many of the documents are presently being used by the Department of Agriculture and the Department of Justice in investigations of possible violations of Federal Law; and that many of the documents sought are not subject to production under Section 8 of the Commodity Exchange Act.

Hearing was held on the motion on January 20, 1966 and the arguments are reported in full in the transcript filed in this proceeding. Memoranda were filed by the respective parties.

Section 47a of the Bankruptcy Act (11 U.S.C. §75a) is entitled "Duties of the Trustees" and sets forth fourteen separate matters to which the trustee must give attention. However, the duties of the trustee enumerated in this section are not exclusive. Further additional duties are prescribed in other sections of the Act and in General Order 17. The judge or referee, or the creditors by resolution, may direct still other things to be done by the trustee, provided they are within the customary functions of such officers. His paramount duty is to conserve and advance the interests of the estate entrusted to him. He is vested with the title of the bankrupt, and he is also the representative of the creditors. He is, further, a quasi officer of the court, and as such is subject to its direction in all matters concerning money or property which may come into his possession by virtue of his office. 2 Collier on Bankruptcy, 14th Ed., pp 1738-1740.

By the first clause of §47a Trustees are required to "collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest." It has

been said that these words state in general language the trustee's "main duty" and that the other clauses of this section are merely directory as to what the trustee shall do in accomplishing the main object and purpose of his appointment. Thus the trustee may carry out the mandate of clause (1) by collecting accounts; by instituting necessary legal actions; and by doing every other thing necessary to bring into the estate, and liquidate, each and every asset that is available and can be found. In short, it is the trustee's duty, representing both the bankrupt and his creditors, to realize from the estate all that is possible for distribution among the creditors and to this end he may assert claims and collect assets even though, in many cases, the bankrupt would be estopped. 2 Collier on Bankruptcy, 14th Ed., pp. 1742-1744. The trustee is the representative of the estate and must do whatever is necessary to advance its interests.

Where the bankrupt is a corporation, the trustee succeeds to the rights of the corporation as to all rights, contractual and statutory, existing for the benefit of the corporation, and as trustee, it is his duty to enforce such rights. 2 Collier on Bankruptcy, 14th Ed. p. 1746.

Stated broadly, the general rule is that the trustee in bankruptcy takes title to all the property of the bankrupt enumerated in §70a of the Act (11 U.S.C. §110a), whether in possession or in action, as determined at the time the petition

is filed, but excepting such property as may be held to be exempt. All property or interests in property specified in §70a pass to the trustee by operation of law. 4 Collier on Bankruptcy, 14th Ed., pp. 978-980.

Clause (5) of §70a confers upon the trustee the bankrupt's title to "property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered." It is not necessary for both of these conditions to be satisfied, if the property in question is transferable, it is not essential that it also be subject to levy or seizure. Conversely, if the property is subject to levy and sale or seizure but is not transferable, it is likewise an asset of the bankrupt estate. 4 Collier on Bankruptcy, 14th Ed., pp. 1028-1032.

The trustee in bankruptcy of a corporation has title to tort actions accruing to the corporation. 4 Collier on Bankruptcy, 14th Ed., pp. 1259-1260 citing Hansen Merchantile Co. v. Wyman, Partridge & Co., 22 Am. B.R. 877, 105 Minn. 491, 117 N.W. 926; Schreiber v. Burton, 10 Am. B.R. (N.S.) 67, 81 Colo. 370, 256 Pac. 1; Thomason v. Miller, 12 Am. B.R. (N.S.) 546, 4 S.W. 9(2d) 668.

In order to perform the duties placed upon him by the Act, a trustee in bankruptcy is charged with the responsibility

of making a full and complete investigation into every facet of the bankrupt's affairs, business and other matters having any relationship to the discovery and recovery of assets. Section 21 of the Act (11 U.S.C. §44) provides the trustee with a means to fulfill this responsibility.

Section 21a of the Bankruptcy Act provides:

"The court may, upon application of any officer, bankrupt, or creditors, by order require any designated persons, including the bankrupt and his or her spouse, to appear before the court or before the judge of any State court, to be examined concerning the acts, conduct or property of a bankrupt, Provided -----."  
(Underscoring supplied)

Section 21k of the Bankruptcy Act provides:

"In all proceedings under this Act, the parties in interest shall be entitled to all rights and remedies granted by the Rules of Civil Procedure for the United States District Courts established from time to time by the Supreme Court pertaining to discovery, interrogatories, inspection and production of documents, and to the admission of execution and genuineness of instruments; Provided -----."

General Order in Bankruptcy 37 provides:

"In proceedings under the Act the Rules of Civil Procedures for the District Court of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. But the court may shorten the limitations of time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding."

Rule 45 of the Federal Rules of Civil Procedure provides:

"(b) For Production of Documentary Evidence.  
A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the book, papers, documents, or tangible things."

The purpose of a Section 21a examination is to assist the trustee to discover concealed assets of the bankrupt, to ascertain whether the bankrupt has given preference to any of his creditors, to learn whether the bankrupt has been guilty of acts which would prevent him from obtaining his discharge in bankruptcy, and in general, to aid the trustee to recover, for the creditors, any property to which they are entitled, to protect their rights in the bankruptcy proceedings, and to assist the court in administering the estate of the bankrupt. *Matter of Prussian*, 43 Am. B.R. 13, 155 Fed 857; *Cameron v. United States*, 21 Am. B.R. 604, 231 U.S. 710, 34 S. Ct. 244, 58 L. Ed. 448. It provides a method for a searching inquiry into the condition of the estate of the bankrupt, assistance in discovering and collecting the assets, and developing facts and circumstances which bear upon the question of discharge. *Travis v. United States*, 123 F2d 268. The purpose has been universally recognized as that of discovery. The object of

such proceeding is to afford creditors and officers charged with the administration of the estate full information in connection therewith in order that the necessary steps may be taken for its preservation. Matter of Eastern Utilities Investing Corp., 37 Am. B.R. (N.S.) 614, 98 F2d 620. It is the aim of Section 21a to furnish the trustee with power to inquire summarily into the existence of assets that may be collected and distributed. Matter of Insull Utility Investments, 41 Am. B.R. (N.S.) 460, 27 F. Supp. 887.

While "any designated person" may be subpoenaed and examined in a bankruptcy proceeding upon application under Section 21a, the examination must concern only the "acts, conduct and property" of the bankrupt. Matter of Madero Bros., 43 Am. B.R. 669, 256 Fed. 859. The examination cannot go into matters not pertaining to the administration of the estate. In re Cliffe, 3 Am. B.R. 257, 97 Fed. 540, or be used to delve into the private affairs of a witness, where such affairs have no connection with the acts, conduct or property of the bankrupt. 2 Collier on Bankruptcy, 14th Ed., page 301.

A witness other than the bankrupt may be compelled to produce upon subpoens books, papers and documents which relate to the "acts, conduct, or property" of the bankrupt, and testify as to their contents. Such books or papers must have some relation to or bearing on the inquiry. The latitude, however, is wide, but the applicant for the Section 21a



examination cannot obtain evidence by such means as to transactions between other persons, with which the bankrupt had no connection. 2 Collier on Bankruptcy, 14th Ed., pages 306-308.

The trustee in bankruptcy in the proceeding now under consideration does not assert that he has a right of action against anyone. His application for the examination indicates that it is for the purpose of determining whether a cause of action might exist. This is one of the important duties that a trustee in bankruptcy must perform and such examination may properly extend to any matters which have a tendency to disclose or have a bearing on the bankrupt estate. In re Youroveta Home & Foreign Trade Co., 288 Fed. 507.

However, the course of the examination must be confined within legal limits, and though the court is vested with a wide measure of discretion as to its scope it must not be pushed so far as to encroach upon the witness' right of privacy in relation to its own affairs, where the concerns of the bankrupt are not involved. Nor must it be permitted to encroach on the rights of others who have had no dealings with the bankrupt. In determining reasonableness of requirements of a challenged subpoena the court is called upon to balance the important function of the trustee to expose chicanery and double-dealing against the incalculable precious right of the citizen to be let alone and to hold his writings inviolate from alien eyes in absence of evidence that the material sought is relevant to the bankrupt's acts or property. Heron v. Blackford, 264 F2d 723.

It is fundamental law that a subpoena duces tecum should describe the documents desired with sufficient definiteness to enable the witness to identify them without any prolonged or extensive search. In matters in litigation, it has been held that a plaintiff is not entitled to have brought in a mass of books and papers in order that he may search them through to gather evidence. 58 Am. Jur. 36.

It is also fundamental law that where a subpoena duces tecum is issued without the previous judicial determination of the sufficiency of the application or affidavit, the court has inherent power to entertain a motion to quash the writ, and on such motion it may determine the question, or whether the documents in question are such that the witness is bound to produce them. 58 Am. Jur. 37-38. This principle has been carried into Rule 45 of the Federal Rules of Civil Procedure.

However, in the matter now under consideration, there is more to the problem than the issuance of a subpoena duces tecum. The trustee in bankruptcy, following proper and appropriate application, was authorized by the Referee in Bankruptcy for the United States District Court for the Southern District of New York to institute ancillary proceedings in this Court for the purpose of conducting examinations of the Commodities Exchange Authority, the United States Department of Agriculture, and other agencies and Department of the Federal Government, pursuant to Section 21a of the Bankruptcy Act; that pursuant

to such authority, the trustee in bankruptcy petitioned this Court to exercise ancillary jurisdiction for the purpose of examining the said Departments and agencies of the Federal Government upon the representation that such examination was necessary in order for the trustee in bankruptcy to properly discharge his fiduciary duties and obligations as such trustee; that a Judge of this Court granted the application of the trustee in bankruptcy and referred the matter to this Referee in Bankruptcy with full authority to proceed to perform such duties in connection therewith as are conferred upon Courts of Bankruptcy by the Bankruptcy Act; that pursuant to such referral this Referee in Bankruptcy, upon petition filed by the trustee in bankruptcy for the examination of the Hon. Orville L. Freeman, Secretary of Agriculture, to which was attached a Schedule of Documents identical to the list of documents made part of the subpoena duces tecum, and after full consideration of facts set forth in the petition and the identification of the documents in the attached schedule, entered an order directing the Secretary of Agriculture to appear at a specified time, bringing with him the documents set forth in the aforesaid Schedule.

As of this date the Judges and Referees of two Courts have concluded that the examination being undertaken by the trustee in bankruptcy is necessary and essential to the performance of his fiduciary duties. This Referee in Bankruptcy gave very

special attention to the Schedule of Documents attached to the petition of the trustee in bankruptcy and, upon concluding that production of the said documents were proper and essential to the investigation being undertaken by the trustee in bankruptcy, and were not in violation of the rights of the witness, ordered the witness to produce them at the hearing.

The issuance of the subpoena duces tecum was not essential to the conduct of the 21a examination, but was undoubtedly a precautionary measure taken by counsel for the trustee in recognition of the fact that, unfortunately, there is greater understanding among attorneys as to the requirements and effectiveness of a subpoena duces tecum than there is to an order of the Bankruptcy Court to produce records.

Consequently, any conclusion reached in connection with the motion to quash or modify the subpoena duces tecum will be equally effective as to the order to produce documents entered by this Court.

At the time this order was entered this Referee was quite aware that the rules and precedents forbidding divulgence or disclosure of information, reports, records, and documents, etc., by public officials and public employees were generally upheld in connection with judicial hearings in private litigation, however, the proceeding now being undertaken by the trustee in bankruptcy is not one of litigation, but one of investigation. It is the opinion of this Referee that under such

circumstances the rules should be interpreted with greater liberality than would be the case in matters of litigation. This Referee is of the opinion that it is the duty of any Federal Government Department or agency to lend its assistance to the trustee in bankruptcy in an investigation in a matter of such widespread importance and public interest as prevails in this case, rather than to throw obstacles in his path.

This Referee was concerned also about the fact that, in the conduct of such a far reaching examination of documents, information concerning persons having no connection with the problem would be opened to the trustee or his agents. However, after due consideration it was concluded that the material sought, insofar as the individual citizen was concerned, was essentially of a public nature, filed in connection with rules regulating the activity they were engaged in, quite distinguishable from private papers maintained in their personal files, and, therefore, examination by the trustee in bankruptcy was permissible.

At the hearing it was suggested that the disclosure of the information requested would result in the disclosure of trade secrets of individual citizens. Of course, this Court would not compel any person to divulge trade secrets in any matter where such person had no connection, or business dealings, with the bankrupt. However, whatever trade secrets

might be divulged by the examination of the documents under order to be produced have now so mellowed with age by the passage of time that they can be of little importance, except, of course, where the trade secret might be the development of a conspiracy or agreement to create the very conditions that resulted in the bankrupt's financial debacle. If that be the case, then there is good reason for disclosure of the documents.

The subpoena is broad and sweeping in its scope. It has to be because of the subjects under consideration. But by subject matter it is as limited as it can possibly be. The fact that a great number of documents are involved is indicative of the fact that a great number of documents were required by the government to regulate and "police" this market. If it was necessary for the government to accumulate these documents in this endeavor, then it is necessary for the trustee to have access to them in order to fulfill his duties.

The memoranda filed by each of the parties are most impressive and it has been an interesting, though time consuming, undertaking to review the many citations presented. This memorandum is being limited in its coverage of applicable legal precedents to those matters concerning the trustee's title to property, the trustee duties and obligations, and the investigatory powers and duty of the trustee. To go further into the other problems would be no more than a duplication of the references cited in the trustee's memorandum which this Court hereby adopts.

This Court finds as follows:

1. That the records and documents in the possession, custody and control of the Secretary of Agriculture must be made available to the trustee in bankruptcy in order for him to properly perform his obligations under the bankruptcy Act.
2. That the trustee in bankruptcy is required to make a thorough examination for the purpose of discovering assets.
3. That a right, or cause, of action available to the bankrupt prior to bankruptcy is an asset of the bankruptcy estate.
4. That the circumstances under which the bankrupt in this proceeding suffered such heavy financial losses demands that the trustee in bankruptcy make an extensive investigation for the purpose of determining the cause or causes for such circumstances.
5. That this is an investigatory proceeding and not an adversary proceeding.
6. That the records under order and subpoena to produce are not confidential records and documents related to the private business of the party under subpoena or of any other party, but are, in fact, public records filed as required by law by persons obligated to make such disclosures in order to engage in the business or activity involved, or documents prepared by the regulating agency in connection therewith, of which the witness is the custodial repository.



7. That this investigation is limited to discovering transactions affecting the bankrupt and the trustee has no interest in obtaining evidence as to transactions between other persons with whom the bankrupt had no connections, except as they might relate to transactions affecting the bankrupt.

8. That the witness had no right to determine whether or not any record or document in his possession does or does not have any relation to the bankrupt.

9. That if there be any records or documents that, when under oath, the witness testifies have no relation to, or connection with, the bankrupt, that record or document shall be shown to the Court for its determination of availability to the trustee in bankruptcy.

10. That weighed against the problem confronting the trustee in bankruptcy the order and the subpoena are not burdensome or oppressive and are not too broad or sweeping in their scope, but to the contrary are as limited as could be under the circumstances.

11. That since the trustee in bankruptcy has volunteered to examine all such records and documents at such place or places as they are regularly kept, such documents as are being used by the Department of Agriculture and the Department of Justice in investigations of possible violations of Federal Law can be made available to the trustee in bankruptcy at a

time and place that is mutually convenient to the trustee and the two Departments.

12. That references to the trustee in bankruptcy herein shall also include his authorized agents and attorneys.

The motion to quash or modify the subpoena duces tecum is denied.

Counsel for the parties shall jointly prepare an order in conformity with the above and submit same on the 10th day of May, 1966, at 9:30 o'clock A.M.

Dated: April 21, 1966

John A. Bresnahan  
JOHN A. BRESNAHAN  
Referee in Bankruptcy

[CAPTIONED OMITTED]

O R D E R

(Filed May 10, 1966)

This matter having come on to be heard on January 20, 1966, upon the motion of the Secretary of Agriculture to quash or modify a subpoena duces tecum duly served upon him on October 22, 1965, in conjunction with the petition of the Trustee of the above-named bankrupt for a 21a examination of the Secretary of Agriculture, and the Court having heard the arguments of counsel and having fully considered the memoranda of law and

affidavits filed by the respective parties herein, and the Court having on April 21, 1966, entered a Memorandum containing its Findings of Fact and Conclusions of Law, and being fully advised in the premises, it is this 10th day of May, 1966,

ORDERED, that the motion of the Secretary of Agriculture to quash or modify the subpoena duces tecum duly served upon him on October 22, 1965, be and hereby is denied; and it is further

ORDERED, that all documents called for in the aforesaid subpoena duces tecum be produced for inspection and copying by the Trustee and his authorized agents and attorneys at such times and places mutually convenient and agreed upon by the parties; provided, that if there be any records or documents that, when under oath, the witness testifies have no relation to, or connection with, the bankrupt, that record or document shall be shown to the Court for its determination of availability to the Trustee in Bankruptcy:

PROVIDED THAT, Orville L. Freeman, Secretary of Agriculture, shall not be required to personally appear in connection with this matter; and

PROVIDED FURTHER, that the witness shall recover from the Trustee his costs and expenses connected with compliance with this order, the exact amount of which to subsequently determined by the Court.

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Referee in Bankruptcy

[CAPTIONED OMITTED]

PETITION FOR REVIEW

(Filed May 19, 1966)

To the Honorable, the Judges of the United States District Court for the District of Columbia:

The petition of Orville L. Freeman, Secretary of Agriculture, respectfully represents:

1. Your petitioner is aggrieved by the order herein of John A. Bresnahan, referee in bankruptcy, dated May 10, 1966, a copy of which order is annexed hereto, marked Exhibit A, and made a part hereof.

2. The referee erred in respect to said order, in that the referee's denial of petitioner's motion to quash or, alternatively, to modify a subpoena duces tecum was contrary to law in the following particulars:

a. The referee erred in failing to conclude that the subpoena duces tecum was so broad and sweeping in scope as to be unreasonably burdensome and oppressive.

b. The referee erred in his finding number 1 in failing to conclude that the trustee has not shown good cause for production of the documents sought in that (1) more than 300,000 of the documents sought are readily available from other, non-government sources, (2) a great number of other subpoenaed documents consist of internal government memoranda,

investigation reports, policy decisions and other information received by the Secretary of Agriculture in confidence, and (3) many of the documents sought are presently being used by the United States Government in connection with investigations of possible violations of Federal law and are therefore immune from disclosure.

c. The referee erred in failing to conclude that more than 300,000 of the documents sought by the subpoena are prohibited by law from disclosure under Section 8 of the Commodity Exchange Act, 7 U.S.C. 12, and that production of such documents would seriously prejudice the public interest and the interests of those persons who have submitted information to the Secretary of Agriculture in confidence.

d. The referee erred in concluding in finding number 5, as amplified on page 11 of his memorandum, that because the trustee's action is an "investigatory proceeding" rather than an "adversary proceeding" the Secretary of Agriculture is not entitled to the protection of the objections and considerations set forth in points (b) and (c), above.

e. The referee erred in concluding that all of the documents sought by the subpoena are "public records filed as required by law by persons obligated to make such disclosures . . . or documents prepared by the regulatory agency in connection therewith . . ." As written, the schedule attached to the subpoena duces tecum encompasses a great many documents which fall in neither category.

f. The referee erred in finding number 11 in ruling that the trustee could inspect "such documents as are being used by the Department of Agriculture and the Department of Justice in investigations of possible violations of Federal law . . . at a time and place that is mutually convenient to the trustee and the two Departments." The referee apparently conceived the petitioner's contention to be that documents being used by the Department of Justice and the Department of Agriculture in current investigations of possible violations of Federal law should not be produced because of their geographic location and the inconvenience to the Government in producing them. The petitioner's contention, however, was that under controlling rulings of this Court such documents are privileged from disclosure to any person, at any time and regardless of their geographic location, while they are being used in such investigations.

2. Petitioner further alleges that subsequent to certain argument upon petitioner's motion to quash or modify subpoena duces tecum, the trustee involved herein has commenced litigation in the Southern District of New York concerning the same subject matter involved in this proceeding. Seligson v. New York Produce Exchange, et al., U.S.D.C. S.D. N.Y., Civil No. 66. Petitioner submits that any and all documents which are properly producible to the trustee can and should be sought through proper discovery procedures in that Court under

the Federal Rules of Civil Procedure, and that thorough discovery from the defendants in the New York action would render compliance with much of the present subpoena unnecessary.

WHEREFORE, petitioner prays that said order be reviewed by a judge in accordance with the provisions of the Bankruptcy Act, that said order be reversed, and that petitioner have such other and further relief as is just.

Dated: Washington, D. C., May 19, 1966.

ORVILLE L. FREEMAN  
Secretary of Agriculture  
Petitioner

JOHN W. DOUGLAS  
Assistant Attorney General

HARLAND F. LEATHERS

FRED W. DROGULA

Attorneys, Department of Justice

Attorneys for Petitioner

[CAPTIONED OMITTED]

CERTIFICATE ON PETITION FOR REVIEW  
(Filed May 24, 1966)

To the Honorable Judges of the United States District Court for  
the  
the District of Columbia:



I, John A. Bresnahan, Referee in Bankruptcy herein, on the petition to review a final order dated May 10, 1966, made by me, hereby certify as follows:

1. Petition for Examination of Hon. Orville L. Freeman Under §21(a) filed October 21, 1965
2. Order for Examination of Hon. Orville L. Freeman, Pursuant to Section 21(a), filed October 21, 1965
3. Minutes of hearing on: 21a Examination of Hon. Orville L. Freeman filed on November 4, 1965
4. Order for Continuing Return Date for Examination of Hon. Orville L. Freeman Pursuant to §21(a), filed November 4, 1965
5. Minutes of continued hearing on: 21a Examination of Hon. Orville L. Freeman, filed December 7, 1965
6. Motion to Continue Return Date for Examination of Hon. Orville L. Freeman Pursuant to §21(a) and Affidavit of Alex C. Caldwell, filed December 7, 1966
7. Order (granting above Motion) filed December 9, 1965
8. Order for Continuing Return Date for Examination of Hon. Orville L. Freeman Pursuant to §21(a), filed December 21, 1965
9. Motion to Quash, or, Alternatively, to Modify Subpoena Duces Tecum, filed January 10, 1966
10. Affidavit of Alex C. Caldwell, filed January 10, 1966
11. Affidavit of Lester P. Condon, filed January 10, 1966
12. Memorandum in Support of Motion to Quash, or, Alternatively, to Modify Subpoena Duces Tecum, filed January 10, 1966
13. Memorandum of the Trustee of Ira Haupt & Co. in Opposition to the Motion of the Secretary of Agriculture to Quash or Modify the Subpoena Duces Tecum Served on the Secretary - filed January 20, 1966

14. Minutes of hearing on: Motion to Quash, or, Alternatively, to Modify Subpoena Duces Tecum and 21a Examination of Hon. Orville L. Freeman, filed January 20, 1966
15. Memorandum of Referee in Bankruptcy (Motion to Quash Subpoena Duces Tecum), filed April 22, 1966
16. Order (denying motion to quash or modify the subpoena duces tecum) filed May 10, 1966
17. Transcript of hearing held on January 20, 1966, filed on February 4, 1966
18. Petition for Review, filed May 19, 1966

Dated: May 24, 1966

Respectfully submitted,

JOHN A. BRESNAHAN

John A. Bresnahan  
Referee in Bankruptcy

copies to:

John W. Douglas, Assistant Attorney General,  
Department of Justice

Michael A. Schuchat, Esq., attorney for trustee

PETITIONER'S EXHIBIT A

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - X

In the Matter

of

IRA HAUPT & CO., a Limited  
Partnership,

Bankrupt.

- - - - - X

In Bankruptcy

No. 64 B 259

ORDER AUTHORIZING APPOINTMENT  
AND RETENTION OF SPECIAL COUNSEL

(Filed June 24, 1966)

At New York, in said District, on the 17 day of  
March, 1965.

Upon the annexed application of CHARLES SELIGSON,  
as Trustee of the estate of the above-named bankrupt, verified  
the 15 day of March, 1965, praying for authority to employ  
and appoint the law firm of Weil, Gotshal and Manges under  
a special retainer to represent him as trustee to make an  
investigation into the facts and circumstances relative to  
the following law suits:

1) UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
- - - - - X  
BERNARD KIEBANOW, GEORGE LEWIS,  
ECON H. OTTINGER, MICHAEL SLOAN  
and HAROLD L. MARANTZ, KENNETH  
ALAN MARANTZ and EDITH LEE MAR-  
ANTZ, as Executors of the Estate  
of Charles Marantz,

Plaintiffs,

-against-

G. KEITH FUNSTON, as President  
of the New York Stock Exchange,  
IRA HAUPT & CO. and MORTON KAMER-  
MAN, as Liquidating Trustee for  
the Benefit of Ira Haupt & Co.,

Defendants.

Index No. 64 Civ. 692

- - - - - X

2) UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
- - - - - X  
BERNARD KIEBANOW and GEORGE LEWIS,

Plaintiffs,

-against-

G. KEITH FUNSTON, as President of  
the New York Stock Exchange, STOCK  
CLEARING CORPORATION, IRA HAUPT &  
COMPANY and MORTON KAMERMAN as Li-  
quidating Trustee for the Benefit  
of IRA HAUPT & COMPANY, and others  
presently unknown to the Plaintiffs,

Defendants.

Index No. 64 Civ. 935

- - - - - X

3) UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
- - - - - X

BERNARD KLEBANOW and GEORGE LEWIS,  
  
Plaintiffs,

-against-

NEW YORK PRODUCE EXCHANGE, NEW YORK  
PRODUCE EXCHANGE CLEARING ASSOCIATION,  
MERRILL LYNCH PIERCE FENNER & SMITH,  
INC., IRA HAUPT & COMPANY, MORTON  
KAMERMAN as Liquidating Trustee for  
the Benefit of IRA HAUPT & COMPANY,  
and others presently unknown to the  
Plaintiffs,

Defendants.

Index No. 64 Civ. 693  
- - - - - X

and to advise him as to the further prosecution of such law suits and upon the annexed affidavit of IRA M. MILLSTEIN, ESQ., a member of the said law firm of Weil, Gotshal & Manges, sworn to the 7 day of March, 1965, and it appearing that no notice need be given and no adverse interest having been represented and it further appearing that members of said law firm are duly admitted to practice in this Court and the Courts of the State of New York, and the Court being satisfied that said law firm of Weil, Gotshal & Manges represents no interests adverse to CHARLES SELIGSON, as trustee, or to the estate, in the matter upon which it is to be engaged and that the employment of said law firm is necessary and would be in the best interests of the said estate; it is

ORDERED, that CHARLES SELIGSON, as trustee, be and he is hereby authorized to employ and appoint the law firm of Weil, Gotshal & Manges, as attorneys for represent him under a special retainer to investigate the facts and circumstances relative to the above-captioned law suits and to advise the said trustee as to the further prosecution thereof; and it is further

ORDERED, that the compensation of Weil, Gotshal & Manges for services rendered on behalf of the said trustee shall be hereafter fixed by this Court upon appropriate application therefor.

EDWARD J. RYAN  
REFEREE IN BANKRUPTCY

United States of America      }  
Southern District of New York } ss

I, Edward J. Ryan, Referee in Bankruptcy, in and for the said district, do hereby certify that the within instrument is a true and correct copy of the original as the same appearance of record in my office.

In Witness Whereof, I hereunto set my hand this 18 day of March, 1966.

EDWARD J. RYAN  
Referee in Bankruptcy

By \_\_\_\_\_  
Clerk

PETITIONER'S EXHIBIT B

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - X

In the Matter

of

In Bankruptcy

IRA HAUPT & CO., a Limited  
Partnership,

No. 64 B.259

Bankrupt.

- - - - - X

APPLICATION FOR AUTHORITY TO INSTITUTE AND  
PROSECUTE A LAW SUIT AGAINST NEW YORK PRO-  
DUCE EXCHANGE, NEW YORK PRODUCE EXCHANGE  
CLEARING ASSOCIATION AND OTHERS AND FOR  
THE APPOINTMENT OF SPECIAL COUNSEL.  
(Filed June 24, 1966)

TO THE HONORABLE EDWARD J. RYAN, REFEREE IN BANKRUPTCY:

The application of Charles Seligson, as Trustee, re-  
spectfully represents:

1. On October 6, 1964, applicant was duly appointed  
Trustee of the Estate of the above named bankrupt and has duly  
qualified and is now acting as such Trustee.

2. At the time of applicant's appointment and qualifi-  
cation herein, there were pending five law suits wherein the bank-  
rupt and Morton Kamerman, as liquidating trustee for the benefit  
of Ira Haupt & Co., were named as nominal defendants. Each of  
said law suits to an extent was derivative in character and had  
been instituted by limited partners of the bankrupt, in various  
combinations, on behalf of the bankrupt and in certain instances  
individually. In respect of each such law suit, the plaintiffs  
were and are represented by the law firm of Rosenman, Colin, Kaye,  
Petschek & Freund, Esqs.

3. Heretofore and by order dated March 17, 1965, ap-  
plicant was duly authorized and empowered to employ and appoint  
the law firm of Weil, Gotshal & Manges, under a special



retainer, to investigate the facts and circumstances relating to three of the then pending law suits and to advise applicant as to the further prosecution thereof.

4/ Included amongst the aforesaid three law suits, then pending, was a law suit instituted in the United States District Court for the Southern District of New York by Messrs. Bernard Klebanow and George Lewis, as Plaintiffs, against the New York Produce Exchange, New York Produce Exchange Clearing Association, Merrill Lynch Pierce Fenner & Smith, Inc., Ira Haupt & Co., Morton Kamerman, as liquidating trustee for the benefit of Ira Haupt & Co. and others presently unknown to the plaintiffs, as defendants, Index No. 64 Civ. 693.

5. Immediately subsequent to the employment and appointment of Weil, Gotshal & Manges, as aforesaid, the said law firm undertook on behalf of applicant, an investigation into the facts and circumstances relating to the relationship between the bankrupt, the New York Produce Exchange, New York Produce Exchange Clearing Association and others for the purpose of advising applicant as to the further prosecution of the pending law suit and the prosecution of claims by him, on behalf of the bankrupt estate in connection therewith.

6. Said investigation encompassed approximately twenty-four sessions of examinations under Section 21a of the Bankruptcy Act conducted before the special master appointed for that purpose in this proceeding as well as examinations

conducted under the aforesaid section of the Bankruptcy Act in ancillary proceedings instituted in the United States District Court for the Northern District of Illinois and United States District Court for the District of Columbia. In addition thereto, thousands of documents were examined by applicant's special counsel in conjunction with his appointed accountants and thousands of hours were devoted by applicant's special counsel and his accountants in relation to this investigation. Applicant and his general counsel were constantly apprised of the progress and posture of the investigation and of the facts uncovered in relation thereto.

7. On March 14, 1966, applicant's special counsel reported to him the results of said investigation and advised him that there existed on behalf of the bankrupt estate factual and legal bases for claims against the New York Produce Exchange, New York Produce Exchange Clearing Association and others for the failure to properly discharge regulatory and other responsibilities imposed by the Commodity Exchange Act and other related improper conduct with respect to the bankrupt including violations of the anti-trust laws of the United States, all in respect of trading in cottonseed oil futures, which conduct allegedly caused losses to this bankrupt estate exceeding \$12,000,000.

8. Applicant's special counsel has also advised him that no benefit accrues to this bankrupt estate by reason

of intervention in the pending law suit against New York Produce Exchange, et al., instituted by certain limited partners of the bankrupt or by reason of substitution for the plaintiffs named therein.

9. Accordingly, applicant seeks authority to institute and prosecute an independent law suit in a court of competent jurisdiction against the New York Produce Exchange, New York Produce Exchange Clearing Association and other defendants as may be designated by his counsel based upon the violations of law described above for the damages sustained by this bankrupt estate and, where appropriate, under the anti-trust laws of the United States, to seek treble damages.

10. Applicant respectfully submits that it is in the best interests of this estate and its creditors that he be authorized to institute and prosecute in a court of competent jurisdiction such a law suit.

11. Applicant seeks authority to employ and appoint the law firm of Weil, Gotshal & Manges, under a special retainer, to institute and prosecute on his behalf as Trustee, the said law suit. As hereinabove stated, the said law firm with the aid and assistance of applicant's accountants, has conducted the investigation into the pertinent facts and circumstances relating to the subject matter of the proposed law suit and are pre-eminently qualified to institute and prosecute the law suit. As described in the application annexed

to the order of March 17, 1965, referred to above, Ira M. Millstein, Esq., the member of the law firm of Weil, Gotshal & Manges responsible for the aforesaid investigation, has particular skills and experience in the areas upon which the said law suit is based.

12. Mr. Millstein has been a partner in the law firm of Weil, Gotshal & Manges since 1957 and at one time was a member of the Anti-Trust Division of the Department of Justice. He is a lecturer on Trade Regulations at the New York University School of Law. At the present time the firm of Weil, Gotshal & Manges consists of twelve partners and twenty-seven associates and in applicant's opinion is qualified to render the professional services necessary to the institution and prosecution of the law suit. In that connection, the services of attorneys are absolutely necessary.

13. Ira M. Millstein, Esq. is admitted to practice in this Court, the Courts of the State of New York and the Courts of Appeal for the First, Second and Fifth Circuits. Other members and associates of the law firm of Weil, Gotshal & Manges are duly licensed to practice in this Court and the Courts of the State of New York.

14. The law firm of Weil, Gotshal & Manges has no agreement as to compensation herein except that the order of March 17, 1965, as amended and enlarged, provides that the compensation of said law firm for services rendered on behalf

of applicant shall be fixed by the Court upon appropriate application therefor. Applicant requests that the order of March 17, 1965 be deemed further amended so as to enlarge the special retainer of the law firm of Weil, Gotshal & Manges so as to encompass the institution and prosecution of the above described law suit.

15. To the best of applicant's knowledge, the law firm of Weil, Gotshal & Manges has no connection with the said bankrupt, its creditors or any other parties in interest or their respective attorneys except as stated in the affidavit of Ira M. Millstein, Esq., annexed hereto and except that the aforesaid order of March 17, 1965 was heretofore amended and enlarged by an order of this Court dated August 16, 1965 so that the special retainer of Weil, Gotshal & Manges encompassed the further investigation and prosecution of applicant's claims against the American Express Company and the said law firm appears as attorney of record for applicant in the action instituted against the said American Express Company now pending in the Supreme Court, State of New York, County of New York. The reasons for the prior amendment and enlargement of the order dated March 17, 1965 are set forth in the application made by applicant annexed thereto, verified August 13, 1965 and are incorporated herein as if set forth fully and at length.

16. The appointment and employment of the aforesaid law firm for the purposes hereinabove described in relation to the institution and prosecution of the said law suit is in the best interests of the bankrupt estate and its creditors.

17. No suggestion or recommendation as to whom to retain in connection with the institution and prosecution of said law suit has been received by your applicant.

18. No previous application for the relief sought herein has been made to this or any other Court.

WHEREFORE, applicant respectfully prays that he be authorized to forthwith institute and prosecute in a court of competent jurisdiction a law suit against the New York Produce Exchange, New York Produce Exchange Clearing Association and others, as aforesaid, and to employ and appoint the law firm of Weil, Gotshal & Manges, under a special retainer, to represent applicant in relation to the institution and prosecution of such law suit and that the order of March 17, 1965, be deemed amended and enlarged as set forth in the prefixed order and that applicant have such other and further relief as is just.

Dated: New York, New York  
March 17, 1966

/s/ Charles Seligson  
CHARLES SELIGSON  
As Trustee

/s/  
SELIGSON & MORRIS  
Attorneys for Trustee  
1290 Avenue of the Americas  
New York, New York 10019  
LT 1-7510

PETITIONER'S EXHIBIT C

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
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In the Matter  
of  
IRA HAUPT & CO., a Limited  
Partnership,  
  
Bankrupt.

In Bankruptcy  
No. 64 B 259

-----  
ORDER AUTHORIZING PROSECUTION OF A LAW  
SUIT AGAINST THE NEW YORK PRODUCE EX-  
CHANGE, NEW YORK PRODUCE EXCHANGE CLEAR-  
ING ASSOCIATION AND OTHERS AND APPOINTING  
SPECIAL COUNSEL.  
(Filed June 24, 1966)

At New York, in said district, on the 21st day of  
March, 1966.

Upon the annexed application of Charles Seligson,  
as Trustee of the Estate of the above named bankrupt, dated  
March 18, 1966, praying for authority to institute and pro-  
secute a law suit in a court of competent jurisdiction in  
connection with claims in favor of the bankrupt estate a-  
gainst the New York Produce Exchange, New York Produce Ex-  
change Clearing Association and others, and that he be  
authorized and empowered as Trustee, to employ and appoint  
the law firm of Weil, Gotshal & Manges, which law firm has  
heretofore conducted an investigation into the facts and



circumstances relating to the aforesaid claims and advised the said Trustee that there are legal and factual bases for the filing and prosecution of a law suit in connection therewith, under a special retainer, so as to enable the said law firm to represent him, as Trustee, and as plaintiff in the prosecution of the Trustee's claims against the New York Produce Exchange, New York Produce Exchange Clearing Association and others and upon the annexed affidavit of Ira M. Millstein, Esq., a member of the law firm of Weil, Gotshal & Manges, sworn to the 18th day of March, 1966, and it appearing that no notice need be given and no adverse interest having been represented and it further appearing that the prosecution of such a law suit is in the best interests of this bankrupt estate and that the members of the aforesaid law firm, Weil, Gotshal & Manges, are duly admitted to practice in this Court and the courts of the State of New York, and the Court being satisfied that said law firm represents no interests adverse to Charles Seligson, as Trustee, or to the estate, in the matters upon which it is to be engaged, as hereinafter set forth, and that the employment of said law firm is necessary and would be in the best interests of the said estate, it is

ORDERED, that Charles Seligson, as Trustee, be and he hereby is authorized and empowered to forthwith institute and prosecute a law suit in a court of competent jurisdiction against the New York Produce Exchange, New York Produce Exchange

Clearing Association and others in relation to the claims of this bankrupt estate against such defendants based upon the failure to properly discharge regulatory and other responsibilities imposed by the Commodity Exchange Act and other related improper conduct with respect to the bankrupt including violations of the anti-trust laws of the United States, all in respect of trading in cottonseed oil futures, which conduct allegedly caused damages to this bankrupt estate exceeding \$12,000,000; and it is further

ORDERED, that the said Trustee be and he hereby is authorized and empowered to employ and appoint the law firm of Weil, Gotshal & Manges, as his attorneys, under a special retainer, to represent him in connection with the institution and prosecution of the aforesaid law suit and to that extent the order of this Court dated March 17, 1965 authorizing and empowering the said Trustee to employ and appoint the aforesaid law firm to conduct an investigation into the facts and circumstances relating to certain law suits therein described, be and the same is hereby deemed amended and enlarged as hereinabove provided; and it is further

ORDERED, that the amended order of this Court dated March 17, 1965, except as hereinabove further amended and enlarged be and the same shall in all other respects remain in full force and effect.

/s/ Edward J. Ryan  
REFEREE IN BANKRUPTCY

PETITIONER'S EXHIBIT D

COMPLAINT

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

66 Civ. No. 1016

---

Charles Seligson, as Trustee in Bankruptcy of Ira Haupt  
& Co., a Limited Partnership, Bankrupt,

Plaintiff,

against

New York Produce Exchange; New York Produce Exchange  
Clearing Association; Donald V. MacDonald; Fahnestock  
& Co.; Harry B. Anderson; Merrill Lynch, Pierce, Fen-  
ner & Smith, Incorporated; Walter C. Klein; Bunge  
Corporation; Harold H. Vogel; Continental Grain Com-  
pany; Sidney Fashena; I. Usiskin & Co.; Carl R. Berg;  
Solomon J. Weinstein and David L. Boyer,

Defendants.

---

Plaintiff Demand Trial by Jury

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Plaintiff, by his attorneys, Weil, Gotshal & Manges, for  
his complaint herein, alleges, upon information and belief ex-  
cept as to paragraphs 1, 2, 3, 5, 6 and 7 hereof, as follows:

I

JURISDICTION AND VENUE

1. This action is brought under the Commodity Exchange  
Act (7 U.S.C. §1-17a), to recover damages resulting from de-  
fendants' violation of said Act, and under Sections 4 and 12  
of the Clayton Act (15 U.S.C. §§15 and 22), and Section 1 of

the Sherman Act (15 U.S.C. §1), to recover treble damages for the violation by the defendants of Section 1 of the Sherman Act.

2. The matter in controversy exceeds the sum or value of \$10,000.00 exclusive of interest and costs.

3. This Court has jurisdiction of this action by virtue of 28 U.S.C. Sections 1331 and 1337.

4. Each defendant is an inhabitant of or may be found in the Southern District of New York and in the case of each corporate or partnership defendant transacts business in the Southern District of New York.

## II

### THE PARTIES

5. At all times hereinafter mentioned, Ira Haupt & Co. (hereinafter referred to as "Haupt") was a limited partnership formed in accordance with the laws of the State of New York and was engaged in a general securities and commodities brokerage and commission business, formerly with an office and principal place of business at No. 111 Broadway, New York, New York. During 1963 and for many years prior thereto, Haupt was registered with and represented in membership on the New York Produce Exchange and was a clearing member of the New York Produce Exchange Clearing Association.

6. On March 23, 1964, an involuntary petition in bankruptcy was filed against Haupt in the United States District

Court for the Southern District of New York, Said proceedings were referred generally to the Hon. Edward J. Ryan, Referee in Bankruptcy and on June 26, 1964, said Referee in Bankruptcy entered a decree adjudging Haupt a bankrupt. On October 6, 1964, plaintiff was duly appointed Trustee of the bankrupt estate of Haupt and thereafter qualified, and plaintiff is presently the duly qualified and acting Trustee in Bankruptcy of Haupt.

7. This action is instituted pursuant to leave of the Hon. Edward J. Ryan, by order dated March 21, 1966.

8. Defendant New York Produce Exchange (hereinafter referred to as "Exchange"), a membership corporation organized and existing under the laws of the State of New York, maintains an exchange and other facilities for the purchase and sale of commodity futures contracts at No. 2 Broadway, New York, New York.

9. Defendant New York Produce Exchange Clearing Association (hereinafter referred to as "Association"), a stock corporation organized and existing under the laws of the State of New York, maintains facilities for the clearance of commodity futures contracts purchased and sold on the Exchange at 60 Beaver Street, New York, New York.

10. Pursuant to the Charter and By-Laws of the Exchange: membership in the Exchange is limited to individuals, and organizations seeking the privileges of membership in the Exchange

must be registered on the Exchange through a partner, in the case of partnerships, and through an authorized person in the case of corporations; and management of the Exchange is vested in a Board of Managers consisting of the President, Vice-President, Treasurer and twelve Managers who must be fairly apportioned from among the various branches of trade interests represented in the Exchange.

11. Defendant Donald V. MacDonald (hereinafter referred to as "MacDonald") was at all times hereinafter mentioned a member of the Exchange, the President of the Exchange, a member of the Exchange's Board of Managers and Chairman of its Executive Committee.

12. Defendant Fahnestock & Co. (hereinafter referred to as "Fahnestock"), a partnership formed in accordance with the laws of the State of New York, is engaged in a general securities and commodities brokerage and commission business in various states of the United States and in the City of New York, with its principal place of business at No. 65 Broadway, New York, New York.

13. At all times hereinafter mentioned, MacDonald was the manager of the commodity department of Fahnestock and acted as Fahnestock's agent, representative and alter ego and under its direction and control with respect to his membership in the Exchange and his activities thereon. By virtue of MacDonald's or other's membership in the Exchange, Fahnestock is

registered with the Exchange and enjoys the rights and privileges of a firm represented in membership on the Exchange, and is subject to the duties and obligations of such membership.

14. Defendant Harry B. Anderson (hereinafter referred to as "Anderson") was at all times hereinafter mentioned a member of the Exchange, a member of the Exchange's Board of Managers and its Executive Committee, and Chairman of the Exchange's Business Conduct Committee and Cottonseed Products and Soybean Oil Committee.

15. Defendant Merrill Lynch, Pierce, Fenner & Smith, Incorporated (hereinafter referred to as "Merrill Lynch"), a corporation organized and existing under the laws of the State of Delaware, is engaged in a general securities and commodities brokerage and commission business in various states of the United States and in the City of New York, with its principal place of business at 70 Pine Street, New York, New York.

16. At all times hereinafter mentioned, Anderson was a Partner or Vice-President of Merrill Lynch and acted as Merrill Lynch's agent, representative and alter ego and under its direction and control with respect to his membership in the Exchange and his activities thereon. By virtue of Anderson's or other's membership in the Exchange, Merrill Lynch is registered with the Exchange and enjoys the rights and privileges of a firm represented in membership on the Exchange, and is subject to the duties and obligations of such membership.



17. Defendant Walter C. Klein (hereinafter referred to as "Klein") was at all times hereinafter mentioned a member of the Exchange, and a member of the Exchange's Board of Managers and its Executive Committee.

18. Defendant Bunge Corporation (hereinafter referred to as "Bunge"), a corporation organized and existing under the laws of the State of New York, is engaged in the business, among other things, of buying and selling commodities in various states of the United States and in the City ~~of~~ New York, with its principal place of business at 1 Chase Manhattan Plaza, New York, New York.

19. At all times hereinafter mentioned, Klein was the President and a director of Bunge and acted as Bunge's agent, representative and alter ego and under its direction and control with respect to his membership in the Exchange and his activities thereon. By virtue of Klein's or other's membership in Exchange, Bunge is registered with the Exchange and enjoys the rights and privileges of a firm represented in membership on the Exchange, and is subject to the duties and obligations of such membership.

20. Defendant Harold H. Vogel (hereinafter referred to as "Vogel") was at all times hereinafter mentioned a member of the Exchange, the Vice-President of the Exchange, and a member of the Exchange's Board of Managers and its Executive Committee.

21. Continental Grain Company (hereinafter referred to as "Continental Grain"), a corporation organized and existing under the laws of the State of Delaware, is engaged in the business, among other things, of buying and selling commodities in various states of the United States and in the City of New York, with its principal place of business at No. 2 Broadway, New York, New York.

22. At all times hereinafter mentioned, Vogel was a Vice-President of Continental Grain and acted as Continental Grain's agent, representative and alter ego and under its direction and control with respect to his membership in the Exchange and his activities thereon. By virtue of Vogel's or other's membership in the Exchange, Continental Grain is registered with the Exchange and enjoys the rights and privileges of a firm represented in membership on the Exchange, and is subject to the duties and obligations of such membership.

23. Defendant Sidney Fashena (hereinafter referred to as "Fashena") was at all times hereinafter mentioned a member of the Exchange, the Treasurer of the Exchange, a member of the Exchange's Board of Managers and its Executive Committee.

24. Defendant I. Usiskin & Co. (hereinafter referred to as "Usiskin"), a partnership formed in accordance with the laws of the State of New York, is engaged in a general commodities

brokerage and commission business in various states of the United States and in the City of New York, with its principal place of business at No. 32 Broadway, New York, New York.

25. At all times hereinafter mentioned, Fashena was an employee or partner of Usiskin and acted as Usiskin's agent, representative and alter ego and under its direction and control with respect to his membership in the Exchange and his activities thereon. By virtue of Fashena's or other's membership in the Exchange, Usiskin is registered with the Exchange and enjoys the rights and privileges of a firm represented in membership on the Exchange and is subject to the duties and obligations of such membership.

26. Defendant (Carl R. Berg was at all times hereinafter mentioned the full-time Managing Director of the Exchange.

27. Defendant Solomon J. Weinstein was at all times hereinafter mentioned the President of the Association and Chairman of its Board of Directors.

28. Defendant David L. Boyer was the full-time Manager of the Association since July 1, 1963 and is presently the Secretary-Treasurer of the Association.

### III

#### CO-CONSPIRATORS

29.(a) The following individuals and companies are not made defendants herein but are named as co-conspirators. Each participated in the acts and failures to act and in the

combination and conspiracy hereinafter alleged. At all times hereinafter mentioned, the individuals named as co-conspirators were members of the Board of Managers of the Exchange and were acting in such capacity under the direction and control of, and as agents, representatives and alter egos of the respective companies named as co-conspirators:

<u>Individual Co-Conspirator</u>	<u>Position in the Exchange</u>	<u>Company Co-Conspirator</u>
Milton Goldfogle	Member of the Board of Managers	Floor broker- No company affili- ation
Thomas Gowdy	Member of the Board of Managers	T.F. Gowdy & Co.
Wallace W. Hyde	Member of the Board of Managers	Cargill, Incorporated
Otto F. Rehders	Member of the Board of Managers	H. Hentz & Co.
Dirk D. VanLinschoten	Member of the Board of Managers	Louis Dreyfus Cor- poration
Dominick R. Comenzo	Member of the Board of Managers	D. R. Comanzo & Inc.
Arthur V. Crofton	Member of the Board of Managers	E. F. Hutton & Company, Inc.
James V. Gurge	Member of the Board of Managers	Holland American Line
Carl E. Preston	Member of the Board of Managers	Floor broker- No company affili- ation
William B. Tucker	Member of the Board of Managers	The Van Iderstine Co.

(b) The following individuals and companies are not made defendants herein but are named as co-conspirators. Each participated in the acts and failures to act and in the combination and conspiracy hereinafter alleged. At all times hereinafter mentioned, the individuals named as co-conspirators were officers and/or directors of the Association and were acting in such capacities under the direction and control of, and as agents, representatives and alter egos of the respective companies named as co-conspirators:

<u>Individual Co-Conspirator</u>	<u>Position in the Association</u>	<u>Company Co-Conspirator</u>
Charles B. Vose	Vice-President --Director	Kohlmeyer & Co.
J. Antonio Zalduando	Secretary-Treas. --Director	Orvis Brothers & Co.
Perry E. Moore	Ass't Sec'y-Treas. --Director	Robert Moore & Co.
Sidney Tessler	Director	Bache & Co., Incor- porated
L. Hudson Leathers	Director	Hayden, Stone In- corporated
Harry A. Zoeller	Director	H. Hentz & Co.

#### IV

#### BACKGROUND OF THE VIOLATIONS ALLEGED

30. On April 19, 1862, the Exchange was incorporated as the New York Commercial Association by an Act of the Legislature of the State of New York. On February 13, 1867, by an Act of the Legislature of the State of New York its name was changed to the New York Produce Exchange.

31. The Exchange was organized for the purpose of providing facilities for engaging in transactions involving the purchase and sale of contracts calling for the future delivery of commodities and to inculcate just and equitable principles of trade. Transactions in contracts calling for the future delivery of domestically produced agricultural commodities, commonly known as "futures contracts", are affected with a national public interest and are carried on by members of the general public located throughout the United States and by persons located throughout the United States who are engaged in the business of buying and selling such commodities and the products and by-products thereof in interstate commerce. With the exception of price, the essential terms of the futures contracts bought and sold on the Exchange are specified by the Exchange.

32. Included among the facilities furnished by the Exchange for the purchase and sale of futures contracts thereon, and an integral part thereof, is the clearance of such contracts through the Association, a process by which the Association becomes substituted as a seller to the buyer and as a buyer to the seller upon all futures contracts made on the Exchange.

33. Pursuant to Exchange rules, all futures contracts made by members of the Exchange must be cleared through the Association, and all such contracts are subject to the Charter,

By-Laws of the Association, the privilege of clearing contracts through the Association is limited to clearing members of the Association and only members of the Exchange or those enjoying the privileges of Exchange membership may become clearing members of the Association.

34. Pursuant to the By-Laws of the Association, certain financial liabilities and obligations are imposed upon the individual clearing members of the Association including but not limited to individual liability to the Association for losses brought about by the default of a clearing member and individual liability for any money judgment or decree entered against the Association. Included among the clearing members of the Association are defendants Fannestock, Merrill Lynch, Continental Grain, and Usiskin and co-conspirators Cargill, Incorporated, E. F. Hutton & Company, Inc., Kohlmeyer & Co., Orvis Brothers & Co., Bache & Co., Inc., Hayden, Stone Incorporated, and H. Hentz & Co.

35. Pursuant to the By-Laws of the Association, clearing members are required to deposit certain original margin with the Association on futures contracts which have been cleared through the Association by the clearing member and the clearing member is also required to maintain, from day to day, the value of such futures contracts. Said daily maintenance of value involves the payment or receipt by the clearing member of the difference between the value of the outstanding contracts



carried by him for customers at the prior day's settlement prices and the current day's settlement prices. In the event of price declines, clearing members having outstanding long or purchase positions with the Association must promptly forward sums to the Association which sums are distributed to clearing members having outstanding short or sale positions with the Association. In the event of increases in price, clearing members having outstanding short or sale positions must promptly forward sums to the Association which sums are distributed to clearing members having outstanding long or purchase positions with the Association. Payments required as a result of such fluctuations in market prices are known as "variation margin". While it is anticipated that the original and variation margin required of the clearing member will be recovered by the clearing member from the customers for whom such contracts were cleared, the clearing member is in all events individually liable to the Association for such amounts on all futures contracts cleared by the clearing member through the Association. As hereinbefore alleged, if a clearing member defaults in the payment of margin to the Association, the By-Laws of the Association provide that other clearing members are individually liable to the Association for the amount of such default, in accordance with a formula set forth in said By-Laws.

36. Included among the commodities for which futures contracts are purchased and sold on the Exchange is cottonseed oil.

37. At all times mentioned herein there were approximately 550 individual members of the Exchange. Individual members of the Exchange and the firms registered and represented in membership thereon (all hereinafter referred to as "members"), were, during the times mentioned herein, actively engaged in the purchase and sale on the Exchange, for themselves and for customers, of futures contracts for a variety of commodities including cottonseed oil. During the year 1963, the volume of trading in cottonseed oil futures contracts on the Exchange exceeded 125,000 contracts and had a total dollar value of approximately \$750 million.

38. Pursuant to the Commodity Exchange Act (hereinafter referred to as the "Act"), futures contracts for certain commodities including cottonseed oil may only be bought and sold on an exchange which has been designated by the Secretary of Agriculture as a "contract market" and by or through a member thereof.

39. Defendant Exchange is and was at all times mentioned herein, a "contract market". In order to qualify for designation as a "contract market" the Exchange was required to show the Secretary of Agriculture that it complied with, and provided assurance to the Secretary of Agriculture that it would continue to comply with, certain conditions and requirements set forth in the Act including the regulation of activities on the Exchange and the prevention of certain types of activity on the Exchange.

40. The Act, and the By-Laws, Rules and Regulations of the Exchange and the Association adopted pursuant to the requirements of the Act, create duties and obligations on the part of the Exchange and the Association and their respective officers, managers, directors and agents, among other things: to comply and enforce compliance with the provisions of the Act, the Regulations of the Secretary of Agriculture promulgated thereunder, and the By-Laws, Rules and Regulations of the Exchange and the Association adopted pursuant thereto; to maintain an orderly market for cottonseed oil futures contracts on the Exchange under such conditions as fairly to reflect the general value of the commodity; to prevent sudden or unreasonable fluctuations in the prices of cottonseed oil futures contracts on the Exchange; to prevent undue and undesirable speculative activity in cottonseed oil futures contracts on the Exchange; to prevent the manipulation of prices of, and cornering of, cottonseed oil futures contracts on the Exchange; to insure fair practices and honest dealings in cottonseed oil futures contracts on the Exchange and in the Association; and to operate the Exchange and the Association in a just and equitable and fair and honest manner.

41. To carry out the said duties and obligations hereinbefore alleged in Paragraph 40, the Exchange and the Association and their respective officers, managers, directors and agents are vested with broad powers under By-Laws, Rules and

Regulations adopted pursuant to the requirements of the Act. Among the powers so possessed are: the power to make, determine, fix, alter, vary and change the rules regulating purchases and sales of, and general trading in, any commodity futures dealt in on the floor of the Exchange; to require members to furnish information; to make investigations of all transactions in commodity futures; to summon witnesses for the purpose of examining and investigating the dealings, transactions, financial condition and general conduct of members; to subpoena and examine books and records; to call upon members for audited statements of their financial condition; to alter or abolish credits which may be given; to increase or decrease margin requirements in futures transactions; to fix the limit of daily permissible price fluctuations for futures contracts; to impose a limitation on the number of contracts which may be held by any person including members of the Exchange and the Association; to compel members of the Exchange and their customers to cease trading and accept a settlement of their contracts; to suspend or expel any member of the Exchange for engaging in conduct made unlawful by the Act or otherwise inconsistent with just and equitable principles of trade; and to deny representation on the Exchange to any non-member thereof engaging in conduct or proceedings inconsistent with just and equitable principles of trade.

42. Members of the exchange and the Association and other persons utilizing the facilities maintained by the Exchange and the Association for effectuating transactions in futures contracts, including Haupt, were entitled to rely on the Exchange and the Association and their respective officers, managers, directors and agents to discharge the duties and obligations hereinbefore alleged in Paragraph 40.

V

VIOLATIONS ALLEGED AS AND FOR A FIRST CLAIM

43. Commencing some time prior to November 20, 1963, the exact date being unknown to plaintiff herein, and continuing to and including November 20, 1963, the defendants and co-conspirators failed to discharge the duties and obligations imposed upon them by the Act, and the By-Laws, Rules and Regulations of the Exchange and the Association adopted pursuant thereto, all in the manner hereinafter described.

44. Beginning in July 1963, and continuing to and including November 20, 1963, Haupt acted as a broker for transactions in cottonseed oil futures contracts on the Exchange of Allied Crude Vegetable Oil Refining Corporation (hereinafter referred to as "Allied"), and its affiliated persons and corporations, including Anthony DeAngelis (hereinafter referred to as "DeAngelis"). The futures contracts executed on the Exchange by Allied and its affiliated persons and corporations through Haupt were also cleared through the Association by Haupt and by virtue of such clearance Haupt became

liable to the Association to maintain the value of the cottonseed oil futures contracts made by Allied and its affiliated persons and corporations, in the manner hereinbefore alleged in Paragraph 35.

45. During 1963, and particularly from the summer of 1963 until on or about November 14, 1963, Allied and its affiliated persons and corporations engaged in activities with respect to the purchase and sale of cottonseed oil futures contracts on the Exchange the tendency and effect of which was to artificially affect the prices of cottonseed oil futures contracts on the Exchange, to cause sudden or unreasonable fluctuations in the prices of such contracts, to constitute undue and undesirable speculative activity in such contracts, to constitute a manipulation of the prices of such contracts, to constitute a corner of such contracts and, in general, to create a disorderly market for such contracts under conditions as not to fairly reflect the general value of the commodity.

46. Among the activities so engaged in by Allied and its affiliated persons and corporations was the purchase, through Haupt and other brokers, of a greater number of cottonseed oil futures contracts than had ever before been held by one person at one time and the frequent consummation of ex-pit transactions (transactions not executed by public outcry at a

pit or ring) involving large numbers of cottonseed oil futures contracts. In August 1963, the cottonseed oil futures contracts outstanding in the name of Allied and its affiliated persons and corporations represented in excess of 50% of the total long position in such contracts outstanding on the Exchange. During the ensuing months the percentage of such contracts held by Allied and its affiliated persons and corporations increased to the point where on November 14, 1963, Allied's holdings of cottonseed oil futures contracts represented approximately 90% of the total long position in such contracts outstanding on the Exchange, of which approximately 80% were carried on the books of the Association in the name of Haupt.

47. From at least the summer of 1963 the defendants and the co-conspirators knew or should have known of the aforesaid activities of Allied and its affiliated persons and corporations and knew or should have known of the tendencies and effects of such activities, all of which the defendants and co-conspirators were required to prevent in order to discharge the duties and obligations imposed upon them by the Act and the By-Laws, Rules and Regulations of the Exchange and the Association adopted pursuant thereto, but failed to do so.

48. On or about November 14, 1963, the defendants and the co-conspirators knew or should have known that the holdings of Allied and its affiliated persons and corporations then represented approximately 90% of the total outstanding long position in such contracts on the Exchange and that substantially



all of the cottonseed oil futures contracts purchased by Allied and its affiliated persons and corporations had been cleared through the Association by Haupt and were carried on the books of the Association in the name of Haupt at that time. From at least on or about November 14, 1963, the defendants and the co-conspirators knew or should have known that the tendency and effect of such concentrated ownership of cottonseed oil futures contracts would be to artificially affect prices for cottonseed oil futures contracts on the Exchange, to cause sudden or unreasonable fluctuations in the prices of such contracts, to cause substantial and continued declines in the prices for such contracts, to cause undue and undesirable speculative activity in such contracts, to create a manipulation of the prices of such contracts, and, in general, to create a disorderly market for such contracts under conditions as not to fairly reflect the general value of the commodity, all of which the defendants and the co-conspirators were required to prevent in order to discharge the duties and obligations imposed upon them by the Act and the By-Laws, Rules and Regulations of the Exchange and the Association adopted pursuant thereto, but failed to do so.

49. On or about November 17, 1963, the defendants and the co-conspirators knew or should have known that continued substantial declines in the prices of cottonseed oil futures contracts on the Exchange would occur and that Allied and its

affiliated persons and corporations had exhausted their financial resources and could no longer maintain the value of the cottonseed oil futures contracts which were executed on the Exchange through Haupt and cleared through the Association by Haupt. From on or about November 17, 1963, the defendants and the co-conspirators knew or should have known that demands by the Association for increased original margin requirements and for variation margin resulting from declines in the prices of cottonseed oil futures contracts on the Exchange would have to be borne by Haupt without any prospect of reimbursement from Allied and its affiliated persons and corporations, thereby placing upon Haupt substantially all of the financial consequences attributable to the failure of the defendants and the co-conspirators to earlier discharge their duties and obligations, and that in view of the size of the position involved Haupt could not continue to maintain the value of such contracts, and that the tendency and effect of such inability would be to further artificially affect the prices of cottonseed oil futures contracts on the Exchange, to cause sudden and unreasonable fluctuations in the prices of such contracts, to cause undue and undesirable speculative activity in such contracts, to result in a disorderly market for such contracts under conditions as not to fairly reflect the general value of the commodity, all of which defendants and the co-conspirators were required to prevent in order to discharge the duties and

obligations imposed upon them by the Act and the By-Laws, Rules and Regulations of the Exchange and the Association adopted pursuant thereto, but failed to do so.

50. As a result of the defendants' and the co-conspirators' said failure to discharge the aforesaid duties and obligations imposed upon them, all as hereinabove alleged, there occurred upon the Exchange, subsequent to November 14, 1963, all of those occurrences which the defendants and the co-conspirators knew or should have known had the tendency and effect to occur, all as hereinabove alleged, and in particular prices for cottonseed oil futures contracts on the Exchange declined substantially subsequent to November 14, 1963.

51. As a result of said decline in the prices of cottonseed oil futures contracts on the Exchange subsequent to November 14, 1963, Haupt was obligated to make margin payments to the Association approximating \$12,000,000., a substantial part of which was distributed by the Association to members of the Exchange and the Association and the customers of such persons, firms or corporations including, but not limited to, defendants Merrill Lynch, Bunge and Continental Grain and certain of the company co-conspirators, all of whom had profited by the said decline in the prices of cottonseed oil futures contracts on the Exchange.

52. Commencing on or about November 14, 1963, and continuing to and including November 20, 1963, the defendants and

the co-conspirators misused information coming to them in their official capacities and abused the trust reposed in them as officers, directors, managers and agents of the Exchange and the Association in order to insure that they and certain other members and customers of members of the Exchange and the Association would profit on their transactions in cottonseed oil futures contracts on the Exchange and insure that certain members of the Association other than the brokers for Allied and its affiliated persons and corporations would not incur financial loss in conjunction therewith.

53. Commencing on or about November 14, 1963, and continuing to and including November 20, 1963, the individual defendants and co-conspirators misused information coming to them in their official capacities and abused the trust reposed in them as officers, directors, managers and agents of the Exchange and the Association by giving such information to, among others, the respective company defendant or company co-conspirator for which he acted as agent, representative and alter ego as hereinabove alleged, which company defendants and co-conspirators aided and abetted in the said misuse of information and abuse of trust by using the information given to them as aforesaid for their own individual profit, as the individual defendants and co-conspirators knew or should have known would be done.

54. On or about November 19, 1963, the defendants and the co-conspirators were advised that Allied had filed a voluntary

petition in bankruptcy and that as a result of, among other things, the substantial price declines occurring in cottonseed oil futures contracts on the Exchange since November 14, 1963, Haupt could no longer meet calls from the Association for variation margin on the cottonseed oil futures contracts which were made on the Exchange by Allied and its affiliated persons and corporations through Haupt and which were cleared through the Association by Haupt. Thereafter, upon the recommendation of the Association, the Exchange voted to suspend trading in cottonseed oil futures contracts on the Exchange and ordered the liquidation of all such contracts at prices fixed by the Exchange. In so doing, the Exchange protected from financial loss, resulting from further declines in prices for cottonseed oil futures contracts on the Exchange, clearing members of the Association who would have been obligated by Association By-Laws to bear the expense of such further losses on the cottonseed oil futures contracts cleared through the Association by Haupt, including but not limited to defendants Merrill Lynch, Continental Grain, Usiskin and certain of the companies named in Paragraph 29 hereof as co-conspirators.

55. By virtue of the bankruptcy of Allied and its affiliated persons and corporations the approximately \$12,000,000. advanced to the Association by Haupt, never has been recovered by Haupt.

56. The artificial price level for cottonseed oil futures contracts on the Exchange, the manipulation of the prices of such contracts, the undue and undesirable speculative activity in such contracts, the sudden and unreasonable fluctuations in the prices of such contracts and the disorderly market for such contracts under conditions as not to fairly reflect the general value of the commodity, all as hereinbefore alleged and all of which caused injury and damage to Haupt as aforesaid, were the result of the defendants' and the co-conspirators' failure to discharge the duties and obligations imposed upon the defendants and the co-conspirators by the Act and the By-Laws, Rules and Regulations of the Exchange and the Association adopted pursuant thereto, in the following ways, among others:

A. Failing to prevent Allied and its affiliated persons and corporations from artificially affecting the prices of cottonseed oil futures contracts on the Exchange.

B. Failing to prevent the manipulation of prices of cottonseed oil futures contracts on the Exchange.

C. Failing to prevent sudden or unreasonable fluctuations in the prices of cottonseed oil futures contracts on the Exchange.

D. Failing to prevent substantial declines in the prices of cottonseed oil futures contracts on the Exchange.

E. Failing to maintain an orderly market in cottonseed oil futures contracts on the Exchange under conditions as fairly to reflect the general value of the commodity.

F. Failing to prevent undue and undesirable speculative activity in cottonseed oil futures contracts on the Exchange.

G. Failing to deny Allied and its affiliated persons and corporations representation on the Exchange for having manipulated the prices of cottonseed oil futures contracts on the Exchange and having otherwise engaged in conduct inconsistent with just and equitable principles of trade.

H. Failing to limit the number of cottonseed oil futures contracts which could be held by traders on and members of the Exchange and the Association.

I. Failing to impose adequate margin requirements for traders on and members of the Exchange and the Association.

J. Failing to investigate the unusual market conditions resulting from the activities of Allied and its affiliated persons and corporations.

K. Failing to investigate whether the activities of Allied and its affiliated persons and corporations were in fact bona fide hedging transactions as claimed by Allied and its affiliated persons and corporations.

L. Adopting the principle of not interfering in other people's business when the facts patently disclosed irregularities which required investigation.

M. Failing to investigate the financial condition of Allied and its affiliated persons and corporations.



N. Failing to examine the books and records of members of the Exchange and the Association or to call for audited statement of their financial condition.

O. Failing to act upon the recommendations and advice of the Commodity Exchange Authority.

P. Failing to maintain an adequate staff organization including permanent investigators to supervise and investigate transactions and activities on the Exchange, and to ensure that all duties and obligations would be carried out properly.

Q. Failing to grant adequate authority to staff members to take the necessary steps when problems arose.

R. Failing to exercise its responsibility for self regulation by permitting and countenancing regulation by persons having a financial interest in the consequences of regulation rather than by disinterested persons.

S. Being concerned with the volume of trading on the Exchange rather than with the maintenance of an orderly market.

T. Permitting the market for cottonseed oil futures contracts on the Exchange to become characterized by undue concentration in the ownership of such contracts.

U. Failing to suspend trading when such suspension was clearly indicated in order to prevent manipulation, disorderly marketing, undue and undesirable speculative activity, sudden and unreasonable price fluctuations, substantial price declines, and unjust and inequitable results.

Misusing information coming to them in their official capacities and abusing the trust reposed in them as officers, directors, managers and agents of the Exchange and the Association in order to insure that certain members and customers of members of the Exchange and the Association would profit on their transactions in cottonseed oil futures contracts on the Exchange, and to protect from financial loss in conjunction therewith certain members of the Association other than the brokers for Allied and its affiliated persons and corporations.

W. Permitting certain members of the Exchange and the Association to use for their own personal profit information given to them by certain defendants and co-conspirators in an abuse of the trust reposed in them as officers, directors, managers and agents of the Exchange and the Association.

X. Making critical decisions based not upon their said duties and obligations but rather upon the self interest of members and customers of members of the Exchange and the Association.

Y. Acting so as to place upon Haupt and other brokers for Allied and its affiliated persons and corporations the entire financial consequences of the failure to discharge said duties and obligations.

Z. Failing to take into account existing market conditions in determining the prices at which the futures contracts outstanding on the Exchange were to be liquidated.

57. By virtue of the aforementioned acts and failures to act the defendants and the co-conspirators failed to discharge the duties and obligations imposed upon them by the Act and the By-Laws, Rules and Regulations of the Exchange and the Association adopted pursuant thereto, and caused Haupt to suffer damages in an amount exceeding \$12,000,000.

## VI

### VIOLATIONS ALLEGED AS AND FOR A SECOND CLAIM

58. Plaintiff repeats and realleges each and every allegation of Paragraphs 1 to 57 above with the same force and effect as if set forth herein at length.

59. Beginning on or about the summer of 1963, and continuing until at least November 20, 1963, defendants and the co-conspirators herein have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in cottonseed oil and cottonseed oil futures contracts in violation of Section 1 of the Sherman Act.

60. As part of said continuing combination and conspiracy defendants and the co-conspirators combined, conspired and agreed among themselves:

A. To abdicate responsibility for discharging the duties and obligations imposed upon them by the Act and the By-Laws, Rules and Regulations of the Exchange and the Association adopted pursuant thereto, by doing and failing to do those things set forth in subparagraphs A through Z inclusive of Paragraph 56, among others.

B. To prevent the prices of cottonseed oil futures contracts on the Exchange from reflecting the general value of the commodity.

C. To control and fix the prices of cottonseed oil futures contracts on the Exchange from and after November 14, 1963, by allowing prices subsequent to that date to decline to a predetermined level.

D. To permit certain members and customers of members of the Exchange and the Association to profit on their transactions in cottonseed oil futures contracts on the Exchange and to protect from financial loss in conjunction therewith certain members of the Association other than the brokers for Allied and its affiliated persons and corporations.

E. To place upon Haupt and the other brokers for Allied and its affiliated persons and corporations the financial losses resulting from the defendants' and co-conspirators' failure to discharge the duties and obligations imposed upon them by the Act and the By-Laws, Rules and Regulations of the Exchange and the Association adopted pursuant thereto.

61. By reason of said combination and conspiracy and the acts taken and not taken in furtherance thereof as more particularly alleged in Paragraphs 58, 59, and 60, the defendants' and the co-conspirators' regulation, restraint and control of transactions in cottonseed oil futures contracts on the Exchange was in unreasonable restraint of interstate trade

and commerce in cottonseed oil and cottonseed oil futures contracts in violation of Section 1 of the Sherman Act, in that said acts and failures to act were not done in good faith but rather to further the selfish interests and personal gain of the defendants and the co-conspirators and in a fundamentally unfair manner.

62. By reason of the aforesaid combination and conspiracy in unreasonable restraint of interstate trade and commerce, Haupt's business and property was injured in an amount exceeding \$12,000,000.

WHEREFORE, plaintiff demands judgment against defendants herein and each of them:

On the first claim, for \$12,000,000. together with interest from November 14, 1963, and the costs and disbursements of this action; and

On the second claim, for \$36,000,000. said amount representing threefold the damages sustained by Haupt, together with interest from November 14, 1963, and the costs and disbursements of this action including reasonable attorneys fees.

WEIL, GOTSHAL & MANGES,

/s/ Ira M. Millstein

By: Ira M. Millstein,  
A Member of the Firm,  
Attorneys for Plaintiff,  
60 East 42nd Street,  
New York, New York 10017.

DEMAND FOR JURY TRIAL

PLEASE TAKE NOTICE that plaintiff demand trial by jury of all issues triable of right by a jury.

Dated: New York, New York  
April 11, 1966.

WEIL, GOTSHAL & MANGES,

/s/ Ira M. Millstein,

By: Ira M. Millstein,  
A Member of the Firm,  
Attorneys for Plaintiff,  
60 East 42nd Street,  
New York, New York 10017.

PETITIONER'S EXHIBIT E

[CAPTION: OMITTED]

AFFIDAVIT

(Filed June 24, 1966)

Washington  
District of Columbia } ss:

Alex C. Caldwell, being duly sworn deposes and says:

1. I am the Administrator of the Commodity Exchange Authority, United States Department of Agriculture, and as such am generally responsible for administration of the Commodity Exchange Act (7 U.S.C. 1 et seq.) and have custody of the records of the Authority on behalf of the Secretary of Agriculture.

2. This affidavit supplements my affidavit of December 6, 1965, in support of the Motion To Continue Return Date For Examination Of Hon. Orville L. Freeman Pursuant To § 21(a), and my affidavit of January 5, 1966, in support of the Motion To Quash, Or, Alternatively, To Modify Subpoena Duces Tecum, in this proceeding. This affidavit relates to statements made in the affidavit of Carl D. Lobell attached to the Memorandum Of The Trustee Of Ira Haupt & Co. In Opposition To The Motion Of The Secretary of Agriculture To Quash Or Modify The Subpoena Duces Tecum Served On The Secretary.

3. I am advised that when the Trustee in Bankruptcy was appointed on October 6, 1964, there was pending in the United States District Court for the Southern District of New York, three law suits brought by certain limited partners of Ira Haupt & Co. One of these law suits (64 Civ. 692) was against G. Keith Funston as President of the New York Stock Exchange, Ira Haupt & Co. and the Liquidating Trustee for the Benefit of Ira Haupt & Co. Another of the law suits (64 Civ. 935) was against G. Keith Funston as President of the New York Stock Exchange, Stock Clearing Corporation, Ira Haupt & Company, the Liquidating Trustee, and others then unknown to the Plaintiffs. The records of the Commodity Exchange Authority contain no information with respect to operations of the New York Stock Exchange or stock transactions of any person on that Exchange.



The third law suit (64 Civ. 693) by such limited partners of Ira Haupt & Co. was against the New York Produce Exchange, New York Produce Exchange Clearing Association, Merrill Lynch Pierce Fenner & Smith, Inc., Ira Haupt & Company, the Liquidating Trustee, and others then unknown to the Plaintiffs.

I am also advised that on May 19, 1966 the Trustee in Bankruptcy instituted an action in the United States District Court for the Southern District of New York against the New York Produce Exchange, its Clearing Association, Merrill Lynch Pierce Fenner & Smith, Inc. and several other futures commission merchants, and other companies and individuals (Seligson v. New York Produce Exchange, et al; 66 Civ. No. 1016). Numerous other companies and individuals were named as co-conspirators.

Many of the companies and individuals named as defendants or co-conspirators were futures commission merchants or traders. By obtaining from them copies of the reports filed by them under the Commodity Exchange Act and examining their other records, the Trustee could determine whether during the period covered by the reports or records there was any unusual activity in connection with futures trading by such traders or any trader-clients of the futures commission merchants, without the necessity of examining the reports or other records in the files of the Commodity Exchange Authority. The examination of the records of the futures commission merchants and traders would reveal much

more extensive information regarding the futures trading operations of traders in reporting status under the Commodity Exchange Act than would be disclosed by the records of the Commodity Exchange Authority. For example the records of the futures commission merchants and traders would show the dates on which a trader's position in a particular future was acquired and closed out through any such futures commission merchant and the prices at which the position was acquired and closed out and therefore would show the profits or losses on the transactions involved. Further, examination of the records of the traders and commission merchants would provide information which is not contained in the records of the Commodity Exchange Authority as to futures trading by the smaller traders since reports of their operations are not required to be filed under the Commodity Exchange Act.

4. In the Lobell affidavit, at pages 6 and 7, it is stated that testimony obtained from officials and members of the New York Produce Exchange indicated that "what had happened during October and November 1963 was a manipulation" and "that the accumulation [of positions by a single interest] was 'artificial' and tended to make the prices higher than it might otherwise have been." As developed below, the Commodity Exchange Authority conducted a thorough investigation of the cottonseed oil and soybean oil futures trading operations of Allied Crude Vegetable Oil Refining Corporation and Anthony DeAngelis during the period July 1, 1963 through November 22,

1963, and concluded on the basis thereof that there was no manipulation of the price of cottonseed oil or soybean oil by said Corporation or Mr. DeAngelis.

The Commodity Exchange Authority in carrying out its responsibilities under the Commodity Exchange Act conducted a thorough investigation under section 8 of the Act with respect to the operations of Allied Crude Vegetable Oil Refining Corporation and Anthony DeAngelis in cottonseed oil futures and soybean oil futures during the period July 1, 1963 through November 22, 1963 to determine whether said Corporation or Mr. DeAngelis had manipulated the price of cottonseed oil or soybean oil or cornered the cottonseed oil or soybean oil market during this period, in violation of the Commodity Exchange Act. The investigation included review of the daily reports filed by Allied Crude Vegetable Oil Refining Corporation and Anthony DeAngelis and all other reporting traders with respect to cottonseed oil or soybean oil futures transactions and positions held during the period covered by the investigation, as well as compilation of pertinent information on the commodity market generally, including data on the production and supply of edible fats and oils and other economic factors affecting the prices of cottonseed and soybean oil, and data on the relationship between cash and futures prices of such commodities.

This affiant supervised this investigation and he and other responsible officials in the Commodity Exchange Authority

carefully analyzed the information developed during the investigation and, on the basis of such information, concluded that there was no manipulation of the price of cottonseed oil or soybean oil and no corner or squeeze of the cottonseed oil or soybean oil market by Allied Crude Vegetable Oil Corporation or Anthony DeAngelis during the period July 1, 1963 to November 22, 1963 (the period covered by this investigation).

If the investigation had disclosed substantial evidence of any manipulation or corner contrary to the Act consideration would have been given by the Commodity Exchange Authority to the possibility of institution of disciplinary proceedings because of such violations against the traders involved under section 6(b) of the Act (7 U.S.C. 9) with a view to refusal to them of trading privileges and consideration would have also been given by the Authority to the propriety of institution of a proceeding under section 5b, 6(a) or 6b of the Act (7 U.S.C. 7b, 8, 13a) against the contract markets involved, for suspension or revocation of their designations as contract markets or for issuance of a cease and desist order against such markets, because of their failure to comply with the requirements of the Act, especially subsection 5(d) (7 U.S.C. 7(d)). Also the matter would have been referred to the United States Department of Justice for consideration of criminal action under section 9 of the Act (7 U.S.C. 13). (The facts with reference to this matter were actually made available to that Department

for review even though it had been concluded by the Commodity Exchange Authority that the investigation did not show any manipulation or corner contrary to the Act.)

Investigation was also made by the Commodity Exchange Authority to determine whether there was any evidence to support allegations that certain officials of the New York Produce Exchange used improperly information as to the futures positions held by Allied Crude Vegetable Oil Refining Corporation and Anthony DeAngelis, furnished to the Exchange by the Commodity Exchange Authority in accordance with the provisions of the Commodity Exchange Act, and manipulated downward the prices of cottonseed oil and soybean oil futures and profited from the losses thereby sustained by said Corporation and Anthony DeAngelis. The Commodity Exchange Authority concluded that the evidence did not support these allegations. If a contrary conclusion had been reached appropriate action would have been taken by the Authority with respect to the institution of administrative proceedings or criminal action for violation of the Act.

/s/ Alex C. Caldwell  
Alex C. Caldwell

Subscribed and sworn to before me at Washington, D. C. this  
24th day of June, 1966.

/s/ Bessie H. Garlich  
Notary Public

PETITIONER'S EXHIBIT F

[CAPTION: OMITTED]

AFFIDAVIT

(Filed June 24, 1966)

Washington  
District of Columbia } ss

Raymond A. Ioanes, being duly sworn, deposes and says:

1. I am the Administrator of the Foreign Agricultural Service, United States Department of Agriculture.
2. This affidavit relates to statements made in the affidavit of Carl D. Lobell attached to the Memorandum of the Trustee Of Ira Haupt & Co. In Opposition To The Motion Of The Secretary Of Agriculture To Quash Or Modify The Subpoena Duces Tecum Served On The Secretary.
3. On page 9 of the Lobell Affidavit, paragraph 15, it is stated that documents produced pursuant to subpoenas issued by the Trustee indicate that the head of the Foreign Agricultural Service (which administers the P.L. 480 export program in which Allied Crude Vegetable Oil Refining Corporation participated) met on numerous occasions with personnel of other companies also engaged in exporting under the P.L. 480 program in an attempt to solicit the cooperation of those companies to stop dealing with Allied in purchases of oil and financing.

4. As Administrator of the Foreign Agricultural Service, I have responsibility for administration of the regulations governing the financing of commercial sales of surplus agricultural commodities for foreign currencies, issued pursuant to Title I of the Agricultural Trade Development and Assistance Act of 1954 (7 U.S.C. 1691, 1701-1708) commonly known as Title I, Public Law 480. The purpose of Title I, among other things, is to stimulate and facilitate the expansion of foreign trade in agricultural commodities produced in the United States by providing a means whereby surplus agricultural commodities in excess of the usual marketings of such commodities may be sold through private trade channels, and foreign currencies accepted in payment therefor. Another purpose of Title I of the Act is to help develop new and expanded cash dollar markets for United States agricultural commodities.

5. Any conversations I had with personnel of companies engaged in exporting commodities under the Title I, Public Law 480 program were designed to maximize exports at the lowest cost to the United States by encouraging the establishment of a broad competitive business base in connection with the export of vegetable oils under such program and by encouraging that all exports meet the highest standards of quality for the particular grade purchased. All such conversation were held in the course of, and to meet and discharge, my official



responsibilities and duties as the Administrator of the Foreign Agricultural Service of the United States Department of Agriculture.

/s/ Raymond A. Ioanes  
Raymond A. Ioanes

Subscribed and sworn to before me at Washington, D. C.  
this 24th day of June, 1966.

/s/ Doris Elizabeth Frew  
Notary Public

[CAPTIONED OMITTED]

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Washington, D. C.

Friday, July 15, 1966.

The above-entitled matter came on for hearing before  
THE HONORABLE EDWARD M. CURRAN, United States District Judge,  
on petition for review.

APPEARANCES:

For the Petitioner:

FRED W. DROGULA, ESQ.  
Attorney for Department of Justice

For the Trustee:

MICHAEL A. SCHUCHAT, ESQ.

- - -

P R O C E E D I N G S

THE DEPUTY CLERK: In the matter of Ira Haupt & Company.

MR. SCHUCHAT: Your Honor, may I present Mr. Carl Bell of the bar of the Court of Appeals of New York who will argue this on behalf of the trustee in bankruptcy.

THE COURT: This is here on a petition for review by the Secretary of Agriculture.

MR. SCHUCHAT: Yes, sir, Mr. Drogula represents the Secretary of Agriculture.

THE COURT: All right.

MR. DROGULA: If it please the Court, my name is Fred Drogula. I am counsel appearing today for the Secretary of Agriculture. The matter today is a review from the Referee in Bankruptcy denying the Secretary's motion to quash or at least substantially modify a subpoena duces tecum served upon him by the trustee of the bankrupt estate of Ira Haupt. The thrust of the Secretary of Agriculture's motion is that this subpoena is a nine page schedule of documents which calls for roughly half a million documents within the files of five agencies of the Department of Agriculture in at least twelve cities across the United States. About 313,000 documents which are sought by the subpoena are precluded by law from production under Section 8 of the Commodity Exchange Act. That is the act which Congress passed requiring people to

submit information who trade on the commodity exchange in confidence and is provided that the Secretary of Agriculture must respect that confidence. Also the subpoena tries to seek production of the official investigation reports of the Federal Bureau of Investigation prepared by them and for the prosecution of federal law violations.

THE COURT: Well, of course they cannot get anything that is prohibitive.

MR. DROGULA: And they also seek production, Your Honor, of documents which the FBI and the Department of Agriculture are presently using in connection with current --

THE COURT: That does not have anything to do with the fact that you are presently using them. You can make copies of them.

MR. DROGULA: Well, Your Honor, as Judge Holtzoff said in the Baker case the government should not have to disclose cases as they are preparing them. In other words, many of these documents are being used by the government in preparing cases and investigations.

THE COURT: Petition to review is denied. That does not mean that you have to produce documents that are confidential in character or are privileged. You can refuse to produce those with the notation they are privileged, either if they are FBI reports or the Congress that has made them so privileged. You prepare the proper order.

MR. DROGULA: Your Honor, may I ask for just a little clarification on that? We have already raised these confidentiality objections and that is what we are raising here today that these documents are confidential.

THE COURT: You hand over the documents that you think are proper.

MR. DROGULA: We have already reached that point, Your Honor.

THE COURT: Have they got them?

MR. DROGULA: We have gone through this -- yes.

THE COURT: They say they don't have them.

MR. DROGULA: Your Honor, when this subpoena was filed we went through the subpoena and we made a list of all of the documents.

THE COURT: Why didn't you turn them over to them?

MR. DROGULA: We made them available. I don't know whether they looked at them or not, but we put them in our office --

THE COURT: Have you looked at them?

MR. BELL: Your Honor, these are just a few of the documents called for in the subpoena. The bulk of the documents called for the government claims are prohibited from disclosure by Section 8 of the Commodity Exchange Act, The Referee has objected to that.

THE COURT: Well then you will have to bring that to a head in another proceeding not on a petition for review because

I have denied this petition for review. Now if they fail to produce according to the subpoena, then you can file a motion to hold them in contempt. Then we will decide whether they are privileged.

MR. DROGULA: Well, Your Honor, of course our petition for review is based on the fact that there are errors of law and we would like, Your Honor -- we don't want the Secretary of Agriculture involved in a contempt proceeding.

THE COURT: Well, that is up to him. He doesn't have to, you know. You can tell him to turn over what they are asking for.

MR. DROGULA: Well, Your Honor, may I say this. All of the arguments which the government is raising as confidential the Referee in Bankruptcy didn't consider. His conclusion was that these considerations were not entitled to weight, the fact that these are confidential documents. His conclusion was that those arguments, the internal documents, investigation reports, documents precluded by statute, all of these --

THE COURT: All you have to do is you can go down the subpoena and if what is called for, Article No. 12, all you got to do is you apply to it, set out what it is, that it is privileged and cite the law that makes it privileged. I am not going to go through a half million documents to decide what you are going to turn over.

MR. DROGULA: Well, that is the problem we have here, and that's why, Your Honor, our argument is that the subpoena

should be quashed and they should be made to plead more specifically.

THE COURT: I am not going to quash the subpoena.

MR. DROGULA: May I say this, Your Honor. The only other way we would get review, if we follow the procedure Your Honor has prescribed here, is if the Referee holds the Secretary of Agriculture in contempt on the grounds that his objections are without merit. Then we will be right back here appealing the contempt citation.

THE COURT: You can come right back here. You can appeal this ruling if you want to, I guess, can't you?

MR. DROGULA: Yes, sir.

THE COURT: It is all right with me. I do not care.

MR. DROGULA: We are dealing with a cabinet officer here and I don't think we should get involved in a contempt proceeding when we have got all the --

THE COURT: I did not say you were going to get involved in a contempt proceeding.

MR. DROGULA: Well, how else can the trustee make us produce these documents?

THE COURT: I do not know. That is up to him, but that is the chance you take.

MR. DROGULA: Well, with all respect, sir, we have already been to the point. All of the documents the government feels it can lawfully produce have been produced.

THE COURT: How many?

MR. DROGULA: We have produced, oh, probably several thousand documents.

THE COURT: How many?

MR. DROGULA: I would say broad categories probably three or four thousand documents.

THE COURT: Three or four thousand and they ask for half a million.

MR. DROGULA: Half a million, that's right.

THE COURT: All right, that is all. Prepare the order.

MR. DROGULA: Your Honor, may we have a stay of the effectiveness of this order so that we can consider what steps we should take?

THE COURT: How long do you want?

MR. DROGULA: Well, we would like 60 days.

THE COURT: Yes, you can have it.

MR. BELL: Sixty days?

THE COURT: Sixtey-day stay, that is right.

- - -

CERTIFICATE OF OFFICIAL COURT REPORTER

I hereby certify that the foregoing is the official transcript of the above proceeding.

/s/ Robert I. Henderson  
ROBERT I. HENDERSON  
Official Court Reporter



[CAPTIONED OMITTED]

O R D E R

(Filed July 18, 1966)

This cause came on to be heard on the petition of the Secretary of Agriculture for review of an Order of the Referee in Bankruptcy dated May 10, 1966 denying the motion of the Secretary of Agriculture to quash or modify a subpoena duces tecum duly served upon him on October 22, 1965, and the Court being advised in the premises, it is this 18 day of July, 1966.

ORDERED AND ADJUDGED that the petition for review be and the same is hereby denied, and the Order of the Referee in Bankruptcy dated May 10, 1966 be and the same is hereby confirmed,

PROVIDED that the execution and enforcement of the Order of May 10, 1966 be and it is hereby suspended until sixty (60) days from July 15, 1966.

/s/ Edward M. Curran  
United States District Judge

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing ORDER was mailed postage prepaid this 15 day of July, 1966, to Fred W. Drogula, Esq., Department of Justice, Washington, D.C. Attorneys for Secretary of Agriculture.

/s/ Michael A. Schuchat  
Michael A. Schuchat  
Attorney for Trustee in  
Bankruptcy

[CAPTION OMITTED]

O R D E R

(Filed July 20, 1966)

This cause came on to be heard on the petition of the Secretary of Agriculture for review of an Order of the Referee in Bankruptcy dated May 10, 1966, denying the motion of the Secretary of Agriculture to quash or modify a subpoena duces tecum duly served upon him on October 22, 1965, and the Court being advised in the premises, it is this 20th day of July, 1966,

ORDERED, that the order entered herein on July 18, 1966, be and it is hereby vacated; and it is

FURTHER ORDERED that the petition for review be, and the same is hereby, denied without prejudice to petitioner's contention herein; and

PROVIDED that the execution and enforcement of the Order of May 10, 1966, be and it is hereby suspended until sixty (60) days from July 15, 1966.

/s/ Edward M. Curran  
UNITED STATES DISTRICT JUDGE

[CAPTIONED OMITTED]

NOTICE OF APPEAL

(Filed August 18, 1966)

Notice is hereby given that Orville L. Freeman, Secretary of Agriculture, petitioner in the above-named proceeding, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Order denying petitioner's petition for review of an Order of the Referee in Bankruptcy dated May 10, 1966, entered in this proceeding on July 20, 1966.

JOHN W. DOUGLAS  
Assistant Attorney General

HARLAND F. LEATHERS

FRED W. DROGULA

Attorneys, Department of Justice  
Attorneys for Petitioner

[CAPTION: OMITTED]

NOTICE OF APPEAL

(Filed August 31, 1966)

Notice is hereby given that Charles Seligson, Trustee in Bankruptcy of the Estate of Ira Haupt & Co., a Limited Partnership, Bankrupt, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the portion of the Order dated July 20, 1966, stating that the denial of the petition of the Secretary of Agriculture for review of the Order of the Referee in Bankruptcy of May 10, 1966 is "without prejudice to petitioner's contentions herein".

/s/ Michael A. Schuchat  
Michael A. Schuchat  
Attorney for Charles Seligson,  
Trustee in Bankruptcy

[CAPTION: OMITTED]

O R D E R

(Filed September 23, 1966)

Upon consideration of the motion of Orville L. Freeman, Secretary of Agriculture to stay the execution and enforcement of the order of the Referee in Bankruptcy dated May 10, 1966 denying the motion of the Secretary of Agriculture to quash or modify the subpoena duces tecum duly served upon him on October 22, 1965 pending an appeal to the United States Court

of Appeals for the District of Columbia Circuit and the opposition thereto filed by Charles Seligson, Trustee in Bankruptcy for Ira Haupt & Co., Bankrupt, it is by the Court this 23 day of September, 1966

ORDERED that the execution and enforcement of the order of May 10, 1966 be and it is hereby stayed to and including January 2, 1967.

/s/ Burnita Shelton Matthews  
UNITED STATES DISTRICT JUDGE

BRIEF FOR APPELLANT AND CROSS-APPELLEE,  
SECRETARY OF AGRICULTURE

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 20478

---

ORVILLE L. FREEMAN, Secretary  
of Agriculture,

Appellant

v.

CHARLES SELIGSON, Trustee In  
Bankruptcy of The Estate of  
Ira Haupt & Co.

Appellee

---

No. 20482

---

CHARLES SELIGSON, Trustee In  
Bankruptcy of The Estate of  
Ira Haupt & Co.

Appellant

v.

ORVILLE L. FREEMAN, Secretary  
of Agriculture,

Appellee

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

United States Court of Appeals  
for the District of Columbia Circuit

FILED NOV 4 1966

*Harold Paulson*  
CLERK

J. WILLIAM DOOLITTLE  
Acting Assistant Attorney General

DAVID G. BRESS,  
United States Attorney

KATHRYN H. BALDWIN,  
Attorney,  
Department of Justice,  
Washington, D.C. 20530.

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## STATEMENT OF QUESTIONS PRESENTED

1. Whether the order of the district court of July 20, 1966, denying without prejudice to the petitioner's contentions the Secretary's petition for review of the Referee's order of May 10, 1966, is an appealable order.

2. Whether the district court erred in failing to pass upon any of the issues raised by the Secretary's petition for review.

3. Whether the district court erred in failing to reverse the Referee's order of May 10, 1966, as contrary to law in all respects as set forth in the petition for review, and in failing to grant the Secretary's Motion to Quash, or, Alternatively, To Modify the Subpoena Duces Tecum.



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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 20478

ORVILLE L. FREEMAN, Secretary  
of Agriculture,

Appellant

v.

CHARLES SELIGSON, Trustee In  
Bankruptcy of The Estate of  
Ira Haupt & Co.,

Appellee

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No. 20482

CHARLES SELIGSON, Trustee In  
Bankruptcy of The Estate of  
Ira Haupt & Co.,

Appellant

v.

ORVILLE L. FREEMAN, Secretary  
of Agriculture,

Appellee

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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BRIEF FOR APPELLANT AND CROSS-APPELLEE,  
SECRETARY OF AGRICULTURE

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JURISDICTIONAL STATEMENT

This action arose upon motion of Orville L. Freeman,  
Secretary of Agriculture, to quash or, alternatively, to modify  
a subpoena duces tecum (J.A. 24)<sup>1/</sup>, issued in ancillary bankruptcy

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<sup>1/</sup> The reference "J.A." is to the Joint Appendix which is separately  
filed in these cases.

proceedings in the District of Columbia. Such proceedings were brought by the Trustee of the estate of Ira Haupt & Co. solely for the purpose of conducting an examination of the Secretary, among others, pursuant to section 21(a) of the Bankruptcy Act, 11 U.S.C. 44(a) (J.A. 21-23). The Referee in Bankruptcy denied the Secretary's motion and ordered production of all material called for by the subpoena (J.A. 200-201). The Secretary filed a timely petition for review under the provisions of section 39(c) of the Bankruptcy Act, 11 U.S.C. 67(c) (J.A. 202-205). The district court, per Curran, J., by order entered July 20, 1966, denied the petition without passing upon any of the issues raised thereby, and "without prejudice to petitioner's contentions"; and granted a stay of the Referee's order for a period of 60 days from July 15, 1966 (J.A. 270). The Secretary filed a notice of appeal on August 18, 1966 (J.A. 271); and the Trustee in Bankruptcy filed a cross-appeal on August 31, 1966 (J.A. 272).<sup>1a/</sup> Upon motion by the Secretary an additional stay was granted by the district court to and including January 2, 1967 (J.A. 272-273).

#### STATEMENT OF THE CASE

1. Background Material. Under the Commodity Exchange Act, 42 U.S.C. 998, as amended, 7 U.S.C. 1, et seq., the Secretary of Agriculture, through the Commodity Exchange Authority, supervises<sup>2/</sup>

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<sup>1a/</sup> By order of this Court entered October 27, 1966, the appeals were consolidated.

<sup>2/</sup> While the Secretary is a member of a commission composed of the Secretary of Commerce, the Attorney General and the Secretary of Agriculture, which exercises certain regulatory power under the (continued on page 3)

the operations of commodity markets such as the Chicago Board of Trade and the New York Produce Exchange, which are designated, in accordance with the provisions of the Act, as "contract markets", where contracts for the future delivery of certain agricultural commodities are bought and sold. To qualify for designation as a "contract market" a board of trade must show the Secretary that it complies with certain conditions and requirements set forth in the Act, including the regulation of the activities on the board and the prevention of certain types of activity, such as the manipulation of prices and the cornering of any commodity by dealers and operators (7 U.S.C. 7).

The Secretary is authorized, among other things, to make investigations of the markets and transactions thereon (7 U.S.C. 12), and the Commission and the Secretary, in accordance with the provisions of the Act, may suspend or revoke the designation of a board as a "contract market", suspend or revoke the registration of commission merchants or floor brokers, and exclude traders from the privileges of contract markets in the event of violation of the Act (7 U.S.C. 6g., 8 and 9). The Secretary is also authorized to make rules and regulations for carrying out the provisions of the Act (7 U.S.C. 12a(5)); and in connection therewith he requires the filing of daily reports by certain clearing members, futures commission merchants and traders (17 C.F.R., 1964 Rev., Parts 15, 16, 17, and 18).

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2/ (footnote continued) Act over commodity markets, the Secretary exercises general supervision under provisions of the Act authorizing him to make regulations and investigations, serve complaints for violations of the Act, hold administrative hearings, revoke the registrations of traders, etc.

Ira Haupt & Co., which was engaged in a general securities and commodity brokerage and commission business, suffered severe losses on the New York and Chicago commodity markets in handling the account of Allied Crude Vegetable Oil Refining Corporation in the purchase of futures contracts in cottonseed oil and soybean oil, and thereafter was adjudged a bankrupt in the United States District Court for the Southern District of New York (J.A. 22, 52-53). On October 6, 1964 Charles Seligson was appointed Trustee of the estate of the bankrupt. On March 17, 1965 the court authorized the Trustee to employ special counsel to make an investigation into the facts and circumstances relative to certain law suits then pending, among which was a suit by certain partners of Ira Haupt & Co. against New York Produce Exchange, New York Produce Exchange Clearing Association, and others, and to advise the Trustee as to the further prosecution thereof (J.A. 53-54, 208-211). In connection with such investigation the Trustee on September 22, 1965 instituted ancillary proceedings in the district court for the District of Columbia, solely for the purpose of conducting examinations under section 21(a) of the Bankruptcy Act, 11 U.S.C. 44(a), of the Commodity Exchange Authority, the United States Department of Agriculture, and other agencies and persons (J.A. 3-10).

2. Proceedings Before the Referee. In the ancillary proceedings in the District of Columbia the Trustee filed on October 21, 1965 a petition for a section 21(a) examination of the Secretary of Agriculture. The petition alleged, inter alia, that

the bankrupt had suffered losses in excess of \$20,000,000 by reason of the losses of its customer Allied Crude Vegetable Oil Refining Corporation; that in order for the Trustee to discharge his fiduciary responsibility to investigate the acts, conduct and property of the bankrupt, it was necessary for him to examine certain documents set forth in a schedule attached to the petition; that all such documents were in the custody and control of the Secretary, and the Trustee had been refused permission to examine them; and that the Trustee was seeking to determine whether a cause of action existed in the bankrupt arising from such losses in the commodity markets (J.A. 21-23). An order was issued for the requested examination of the Secretary (J.A. 23a); and at about the same time a subpoena duces tecum was served upon the Secretary calling for the identical schedule of documents (J.A. 11-21).

The schedule covered 19 paragraphs of documents requested, and "document" was defined as "the original or any copy of any book, record, paper, report, memorandum, communication, letter, tabulation, chart, worksheet, analysis, summary, transcript, or other writing" (J.A. 12). Paragraphs 1, 2 and 3 of the subpoena schedule called for all daily reports filed with the Commodity Exchange Authority, pursuant to regulations, by clearing members, futures commission merchants, and traders in lard, cottonseed oil and soybean oil, and cottonseed and soybean meal<sup>3/</sup> on the Chicago

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<sup>3/</sup> The numbered series of report forms as called for in the Subpoena are shown in 17 C.F.R., section 15.02.

Board of Trade and the New York Produce Exchange for a four year period commencing January 1, 1960. These requests cover an estimated 313,000 documents (J.A. 13-14, 35). Paragraph 4 called for "all documents" indicating, disclosing or otherwise relating to investigations made by the Secretary over a five year period commencing January 1, 1960, into market conditions concerning cottonseed and soybean oil; and paragraph 6 called for the same type of information for the year 1963 concerning operations of the New York Produce Exchange with respect to transactions in cottonseed oil and operations of the Chicago Board of Trade with respect to soybean oil, and any investigation concerning the actual or alleged failure of either Board to prevent manipulation of prices or cornering of the market in these commodities (J.A. 14, 15).

Paragraphs 5 and 7 called for "all documents" relating to the cash and futures markets in cottonseed and soybean oils furnished by the Secretary for a five year period to producers, consumers and distributors; and "all documents" indicating or disclosing names, addresses and amounts of futures contracts purchased or sold by "any or all persons" trading in these commodities on the Chicago Board of Trade and the New York Produce Exchange which were disclosed or made public by the Secretary in 1963, and "all documents" indicating or disclosing the names of the persons, firms, or organizations to which such information was disclosed (J.A. 14, 15).

Paragraphs 8 and 9 called for "all documents" indicating or disclosing any information concerning the markets for cottonseed



and soybean oils, any transaction or market operation with respect thereto, or any person, firm or organization trading in such commodities which was communicated or disclosed during 1963 by the Secretary, the Administrator of the Commodity Exchange Act, or other official or employee of the Department of Agriculture pursuant to section 8a(6) of the Act to the Chicago Board of Trade or the New York Produce Exchange or any committee, official or employee thereof; "all documents" indicating or disclosing any recommendation, proposal or suggestion concerning the same subject matter, made by the same persons to the same boards; and "all documents" indicating or disclosing the substance of any discussion between such persons with respect to such information or recommendation, proposal or suggestion (J.A. 16-17).

Paragraphs 10 and 11 requested "all documents" indicating or disclosing "any communication" during a four year period between the Secretary, the Act Administrator, or any other official or employee of Agriculture, and Anthony DeAngelis or other official or employee of Allied Crude Vegetable Oil Refining Corporation; and the same information for the year 1963 respecting any communication between such Government personnel and "any person, firm or organization" concerning the market for cottonseed and soybean oils, any transactions with respect thereto, or any person, firm or organization trading in such commodities (J.A. 17-18).

Paragraphs 12 and 13 called for "all documents" for the period January 1, 1935 to December 31, 1963, indicating, disclosing or revealing the facts and circumstances concerning any

investigation of the Chicago Board of Trade or the New York Produce Exchange, or any suspension or revocation of the designation of such boards as contract markets, for failing to prevent a manipulation of prices or cornering of any commodity on such markets; and "all documents" concerning any complaint served by the Secretary during the same protracted period upon any person charging manipulation or an attempted manipulation of the prices of any commodity on such board, and the outcome of such complaint (J.A. 18-19).

Paragraphs 14 and 15 requested "all documents" concerning crop or market information relating to, or conditions affecting the price of, cottonseed and soybean oils furnished during 1963 to the Commodity Exchange Authority; and "all documents" indicating or disclosing any information furnished such Authority during 1963 by a member or clearing member of the Chicago Board of Trade or the New York Produce Exchange concerning transactions commonly called "pass-outs" in soybean or cottonseed oil futures (J.A. 19). Paragraph 16 requested "all documents" prepared by or formerly in the possession of Ira Haupt & Co. and any of its partners or employees since January 1, 1960, and presently in the possession or under the control of the Secretary, the Act Administrator or the Inspector General of the Department of Agriculture (J.A. 20).

Paragraphs 17, 18, 19 called for "all documents" for the period January 1, 1960 to the present containing information concerning complaints or intelligence received, concerning investigations made, or reflecting a course of conduct or regulatory

action adopted by the Secretary, the Act Administrator, or the Inspector General, into the operations and affairs (a) of Ira Haupt & Co., or any of the partners or employees, (b) of Allied Crude Vegetable Oil Refining Corporation, an affiliate, Anthony DeAngelis, and certain other persons, and (c) of six named companies and brokerages houses (J.A. 20-21).

The Government moved to quash or modify the subpoena on the grounds that it was burdensome and oppressive and too sweeping in scope; that no "good cause" was shown therefor; that many of the documents are presently being used by the Departments of Agriculture and Justice in investigations into possible violations of federal law; and that many of the documents were protected from production by the prohibition in section 8 of the Commodity Exchange Act, 7 U.S.C. 12, against disclosure of "data and information which would separately disclose the business transactions of any person and trade secrets or names of customers" (J.A. 24). Supporting the motion were affidavits by Alex C. Caldwell, Administrator of the Commodity Exchange Authority (J.A. 25-43), and by Lester P. Condon, the Inspector General of the Department of Agriculture (J.A. 44-51). The Secretary did not file a formal claim of privilege.<sup>4/</sup>

The Caldwell, affidavit stated, among other things, that the daily reports called for in paragraphs 1, 2 and 3 of the schedule, the investigations of market conditions in paragraph 4, insofar as they were incidental to investigations and operations

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<sup>4/</sup> As discussed, infra, (p.32 ) a formal claim of privilege is not usually determined and made until all other objections have been ruled upon by the court.

of specific traders, the communications between Agriculture and the exchanges and other persons and firms within the demand of paragraphs 8, 9, 10, and 11, the information respecting complaints of manipulation of prices called for in paragraph 13, and the classes of documents demanded by paragraphs 17, 18 and 19, would all come within the prohibition against disclosure in section 8 of the Act, 7 U.S.C. 12, as data or information which would "separately disclose the business transactions of any person and trade secrets or names of customers" (J.A. 35-37). And in this connection the affidavit pointed out that such disclosure would be extremely damaging to traders, especially those who merchandise, store or process such commodities and use the futures market to "hedge" their positions (J.A. 30); that the disclosure of names and addresses of "hedgers" and their transactions would "reveal to their competitors the extent of their involvement in merchandising, storing, or processing a commodity because of the usually close relationship between the futures position and the total volume of their actual commodity operations, e.g., inventory holdings" (J.A. 31); and that it would also reveal to competitors the "pattern of trading" followed by the trader and "serve as an indicator of the normal trading that could be expected to be done by such trader in the future." (J. A. 31).

The affidavit also stated that the principal documents within the scope of paragraphs 17, 18 and 19 are reports of investigations which involve auditing of records of persons under investigation, and frequently include interviewing such person,

his employees and others (J.A. 37). These reports would separately disclose the business transactions or trade secrets or names of customers not only of the subject of investigation but in many cases also those of persons not implicated in any violation of the Act. Moreover, interviews with such latter persons are usually conducted with the understanding that the information given will be kept confidential, and if this is not done, it will inhibit information necessary in future investigations (J.A. 37-38). Further, investigation reports involve evaluation of facts by investigators, expert opinions, intra-departmental and inter-departmental advisory memoranda, recommendations as to prosecution or administrative action, and legal advice (J.A. 38-39). In addition, the affidavit states that the scope of paragraphs 10, 11, 17, 18, and 19 is so broad and sweeping that it could require search of records of at least six major agencies of the Department of Agriculture, with documents in Washington, field offices and federal records centers throughout the country, and that the search would be laborious, time consuming and costly. (J.A. 39-43).

The affidavit of the Inspector General shows that investigations made by that agency are primarily concerned with developing evidence for use in criminal, civil and other legal actions; that information from such offices as the FBI and Internal Revenue Service is an integral part of the files of the agency; that most information given investigators is necessarily on the basis of voluntary cooperation, and is given in confidence; and that investigations include intra-agency and inter-agency

memoranda with expressions of opinions, recommendations and the like (J.A. 45-48). The affidavit also states that some of the matters investigated which are within the apparent scope of the subpoena are pending in the Department of Justice under consideration for possible institution of civil or criminal actions, and some are being considered by Agriculture for administrative proceedings (J.A. 47). The affidavit further sets forth the great burden and costs involved in searching the files for the material requested in paragraphs 10, 11, 18 and 19 with which the office of Inspector General would be primarily concerned (J.A. 48-51).

The Trustee filed an opposition, together with an affidavit, to the Secretary's motion (J.A. 52-62). The affidavit stated, among other things, that losses arising out of trading in cottonseed and soybean oils on commodity futures markets in November 1963 were substantial factors in the bankruptcy of Ira Haupt & Co.; that a number of suits had been commenced on behalf of the bankrupt prior to the appointment of the Trustee, one of which related to injuries to the bankrupt as a result of such trading losses; that upon application by the Trustee, special counsel was appointed to investigate the facts and circumstances relative to these law suits, and to advise the Trustee as to the further prosecution thereof; that examinations under section 21(a) of the Bankruptcy Act by such special counsel had been conducted since May 1965, and that others were currently scheduled; and that records from the Department of Agriculture were essential to determine claims that might be vested in the bankrupt.



On January 20, 1966 a hearing was held on the Secretary's motion (J.A. 63-182). At that hearing the Secretary took the position, among others, that the subpoena was so broad and all-inclusive as to be unreasonable and oppressive on its face; that there were alternative means in pending litigation on behalf of the bankrupt for the Trustee to get much of the information he sought; that on the issue of good cause and the balancing of the interests of the Trustee against those of the Government in protecting such documents from disclosure, the balance is all in favor of the latter; that many of the documents called for, and particularly the daily reports of clearing members, commission merchants and traders, covered reports for four years and included those of persons who are not involved in the particular events of 1963, and will reveal patterns of trading, inventory holdings and customers' names; and that such daily reports are protected from disclosure by the prohibition in section 8 of the Commodity Exchange Act (J.A. 68, 71, 79-86, 136-138, 177).

It was the Trustee's position, among others, that he was not then involved in any way in the litigation in New York on behalf of the bankrupt; that the section 21(a) examination was to investigate acts, conduct and property of the bankrupt, that a potential cause of action was "property", and that the Trustee clearly had a cause of action, it was simply a question of against whom; that the Trustee needed the daily reports of clearing members, commission merchants and traders in order to determine trading patterns in cottonseed and soybean oils and whether persons, firms and organizations caused injury to the bankrupt;



that no trade secrets were involved within the prohibition of section 8 of the Act, since all trades in the daily reports sought were closed; and that, in any event, the section 8 prohibition could not protect the trading reports from subpoena (J.A. 95-98, 106-107, 116-117, 124-125, 126-127).

While the Government's motion was under consideration, and on April 11, 1966, a complaint was filed in the Southern District of New York by the Trustee against the New York Produce Exchange, New York Produce Exchange Clearing Association, various individuals who are members of the exchange and the association, and firms represented in membership (J.A. 222-253). The suit was brought on the basis of investigation and reports by the Trustee's special counsel as authorized in 1965, and sought to recover for losses sustained by the bankrupt in the commodity market in November 1963, and treble damages on an anti-trust count (J.A. 212-215). The complaint listed 15 defendants and 16 co-conspirators (J.A. 222-229, 229-231).

On April 21, 1966 the Referee handed down his memorandum opinion (J.A. 183-200). The Referee found that the subpoena was broad and sweeping in its scope but that in light of the problems confronting the Trustee it was not burdensome or oppressive and not too broad and sweeping (J.A. 197, 199); the court would not compel any person to divulge trade secrets in any matter where such person had no connection or business dealings with the bankrupt, but that whatever trade secrets might be divulged by the examination under this order had so mellowed with age by the passage of time that they could be of little importance (J.A. 196-197);

and the records sought are not confidential records and documents relating to the private business of the party under subpoena or any other party, but are public records filed as required by law or documents prepared by the regulating agency in connection therewith (J.A. 196, 198). The Referee also found that this was an investigatory proceeding and not an adversary proceeding, (and held that, while there were certain rules and precedents forbidding divulgence or disclosure of information, reports, and documents by public officials in connection with judicial hearings, these were not to be applied in the present examination being conducted under section 21(a) of the Bankruptcy Act (J.A. 195-196, 198).

On May 10, 1966 the Referee entered his order denying the Secretary's motion to quash or modify the subpoena and ordering that all of the documents called for be produced for inspection and copying by the Trustee and his authorized agents and attorneys at times and places mutually agreed upon by the parties (J.A. 200-201).<sup>5/</sup> On May 19, 1966 the Secretary filed a petition for review in which he contended that the Referee erred (1) in failing to conclude that the subpoena was so broad and sweeping in scope as to be unreasonably burdensome and oppressive; (2) in failing to conclude that the Trustee had not shown "good cause" for production of the documents sought in that (a) the bulk of the documents were available from other non-government sources,

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<sup>5/</sup> At that time the Referee rejected hearing the Government's argument that the Trustee's filing of a suit in New York materially affected the conclusions theretofore reached by the Referee as to production by the Secretary, without deciding the point; and the Referee made notation on his order to that affect.

(b) a great many of the other documents consisted of internal Government memoranda, investigation reports, policy decisions, and information received by the Secretary in confidence, and (c) many of the documents are presently being used by the Government in connection with investigations of possible violations of federal law; (3) in failing to conclude that in the case of more than 300,000 of the documents disclosure was prohibited by section 8 of the Commodity Exchange Act, 7 U.S.C. 12, and that production of such documents would seriously prejudice the public interest and the interests of those persons who had submitted information to the Secretary in confidence; (4) in concluding that all of the documents were "public records filed as required by law by persons obligated to make such disclosures \* \* \* or documents prepared by the regulating agency in connection therewith \* \* \*"; and (5) in concluding that because the Trustee's action is an "investigatory proceeding" rather than an "adversary proceeding", the Secretary was not entitled to the protection of the rules and precedents respecting disclosure of information, reports, records and documents by public officials as applied in connection with judicial hearings in private litigation (J.A. 202-205).<sup>6/</sup>

3. Proceedings In The District Court. In the district court each party filed a memorandum, and the Secretary filed exhibits, including two affidavits. Exhibits A, B and C covered proceedings in the United States District Court for the Southern District of New York in the bankruptcy of Ira Haupt & Co., in which the Trustee was granted authority to employ

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<sup>6/</sup> The Secretary also moved to suspend enforcement of the Referee's order pending action by the court on the petition for review and such motion was granted.

special counsel to investigate the facts and circumstances relative to certain pending law suits involving the bankrupt and to advise the Trustee as to the further prosecution thereof (J.A. 208-211); and the Trustee, as a result of such investigation and report and advice by special counsel, sought and was granted authority to institute and prosecute a suit to recover for certain losses sustained in trading on the commodity market (J.A. 212-221). Exhibit D is the complaint in the action commenced on April 11, 1966, by the Trustee pursuant to such authority against the New York Produce Exchange, New York Produce Exchange Clearing Association, various members of such exchange and association, and certain brokerage houses (J.A. 222-253). Exhibits E and F are affidavits which stated, inter alia, that the Secretary conducted a thorough investigation of the cottonseed and soybean oil futures trading operations of Allied Crude Vegetable Oil Refining Corporation and Anthony DeAngelis during the period July 1, 1963 and November 22, 1963, and concluded on the basis thereof that there had been no manipulation of the prices of, and no cornering of the market on, such commodities by either such corporation or such individual during the period covered by the investigation (J.A. 256-258); and that further investigation was also made from which it was concluded that there was no evidence to support allegations that certain officials of the New York Produce Exchange used improperly information as to the futures positions held by Allied and DeAngelis and manipulated downward the prices of cottonseed and soybean oil futures and profited from the losses thereby sustained by Allied and DeAngelis (J.A. 259).

At the hearing before the district court on July 15, 1966 (J.A. 262-268), the court denied the petition without ruling on any of the legal issues raised by the Secretary. At the same time, it said that the Government did not have to produce documents that are confidential in character or are privileged, that it could refuse to produce privileged documents either because they were FBI reports or Congress had made the documents privileged (J.A. 264). When Government counsel asked for clarification, noting that he had already raised these very objections to the Referee's order, the court said that if the Secretary failed to produce according to the subpoena the Trustee could move to hold him in contempt, and at that time the matter of which documents were privileged could be decided (J.A. 265-266).

On July 18, 1966, the court entered its order denying the petition for review (J.A. 269). On July 20, 1966, it vacated that order, denied the petition "without prejudice to petitioner's contentions", and granted a stay of the Referee's order for 60 days from July 15, 1966 (J.A. 270). Notice of appeal was filed by the Secretary on August 18, 1966 (J.A. 271), and on August 31, 1966, the Trustee filed a cross-appeal (J.A. 272). On September 2nd the Government moved the district court for an additional stay pending determination of the appeal, and stay was granted to and including January 2, 1967 (J.A. 272-273).

#### STATUTES AND RULES INVOLVED

Pertinent provision of the Bankruptcy Act in Section 2(a)(10), 11 U.S.C. 11(a)(10); Section 21(a), (b), and (k), 11 U.S.C. 44(a), (b), and (k); Section 24(a) and (b), 11 U.S.C. 47(a) and (b);

Section 38, 11 U.S.C. 66; and Section 39(c), 11 U.S.C. 67(c); pertinent provisions of the Commodity Exchange Act in Section 8, as amended, 7 U.S.C. 12, 12-1, and 12a(5) and (6); and pertinent parts of Rules 26(b), 30(b), 34 and 45(b) of the Federal Rules of Civil Procedure are set forth in an Appendix, infra, to this brief.

#### STATEMENT OF POINTS

1. The order of the district court of July 20, 1966, denying without prejudice to petitioner's contentions the Secretary's petition for review of the Referee's order of May 10, 1966, is a final appealable order.

2. The district court erred in failing to pass upon any of the issues raised by the Secretary's petition for review.

3. The district court erred in denying the petition for review.

4. The district court erred in failing to hold that the Referee's order of May 10, 1966, which order denied the Secretary's Motion to Quash, or, Alternatively, to Modify the Subpoena Duces Tecum, and required the Secretary to produce the documents called for by the subpoena, was contrary to law in all respects as set forth in the petition for review.

5. The district court erred in failing to reverse the Referee's order of May 10, 1966, and to grant the Secretary's Motion to Quash, or, Alternatively, to Modify the Subpoena Duces Tecum.

#### SUMMARY OF ARGUMENT

1. When the Referee in Bankruptcy denied the motion of the Secretary of Agriculture to quash or, in the alternative to modify the subpoena duces tecum, and ordered the Secretary to produce all



of the documents called for, the district court denied the Secretary's petition for review without passing upon any of the legal issues raised by the petition and "without prejudice to petitioner's contentions". That order was entered in "proceedings in bankruptcy" and effectively determined issues respecting the rights of the parties, since the Secretary was required to comply with the Referee's order for production. It was, therefore, an appealable order under section 24 of the Bankruptcy Act, 11 U.S.C. 47. 2 Collier on Bankruptcy, Sec. 24.16; In re Equitable Plan Co., 272 F.2d 156 (C.A. 2). Should this Court for any reason disagree, then the order is appealable as within that class of cases which "finally determine claims of right separable from, and collateral to, rights asserted in the action." Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546.

2. Various sections of the Bankruptcy Act, and particularly section 39(c), 11 U.S.C. 67(c), make it clear that the Secretary had an absolute right in this case to review by the district court of the issues raised by the petition for review, and the district court erred in failing to give that review. In re Leigh, 78 U.S. App.D.C. 261, 139 F.2d 386; 2 Collier on Bankruptcy, Sec. 39.18, p. 1483. However, the Secretary's right to have the issues decided in his favor is so clear that the determination should be made by this Court at this juncture of the case. Should this Court be of the view that the Secretary is not entitled to prevail on the present issues, the case should be remanded to give the Secretary an opportunity to file a formal claim of privilege.

3. On the merits, the Secretary is entitled to have the subpoena quashed as unreasonable and oppressive. At the very least he is entitled to have it modified to eliminate more than 300,000



of the documents called for. The same rules and precedents apply in a section 21(a) examination in bankruptcy as apply under the Federal Rules of Civil Procedure and appropriate decisions in cases of litigation. Sec. 21(b) and (k), 11 U.S.C. 44(b) and (k).

a. The subpoena in this case covers not only formal reports, transcripts, records, work papers, tabulations, letters, and memoranda, but every scrap of paper in the numerous Government files which come within the demand. It fails to "designate" as required by Rule 45, F.R.Civ.P.; and in requesting "all documents" in any number of categories and over extensive periods of time, the subpoena is unreasonable and oppressive and should be quashed. Clay v. Southern Railway Company, 284 F.2d 152 (C.A. 5); Continental Distilling Co. v. Humphrey, 17 F.R.D. 237 (D.D.C.); Public Administrator of the Courts of New York v. Rogers, 26 F.R.D. 118 (S.D.N.Y.).

b. Nor has the Trustee met the "good cause" requirement of Rule 34, which is read into Rule 45, F.R.Civ.P. The Trustee is seeking Government documents which strong public policy makes confidential and the Government is not a party to any litigation with the Trustee. In these circumstances, the Trustee must show "compelling necessity" for the documents he seeks, and he has failed to meet that burden, United States v. Procter & Gamble Co., 356 U.S. 677; Alltmont v. United States, 177 F.2d 971 (C.A. 3). Particularly is this true where, as in the present case, the Trustee has not shown that he has exhausted his discovery rights in litigation which he has now commenced.

c. Many of the documents sought are the subject of well-recognized privileges against disclosure, such as (1) intra-agency

and inter-agency advisory opinions and matters going to policy considerations, Machin v. Zuckert, 114 U.S.App.D.C. 335, 316 F.2d 336, certiorari denied, 375 U.S. 896; (2) information voluntarily given the Government under assurances of confidentiality, Vogel v. Gruaz, 110 U.S. 311; Machin v. Zuckert, supra; (3) attorneys' work products, Hickman v. Taylor, 329 U.S. 495; and (4) documents under consideration for possible institution of civil or criminal action, Capitol Vending Co. v. Baker, 35 F.R.D. 510 (D.D.C.). As to these documents a strong showing of necessity must be made before there need be any showdown on a claim of privilege, and the Trustee has made no such showing.

d. More than 300,000 of the documents called for, including daily reports of clearing members, futures commission merchants and traders, investigatory files, and communications between the Department of Agriculture and various persons, firms and organizations, are protected from disclosure by section 8 of the Commodity Exchange Act, 7 U.S.C. 12, as "data and information which would separately disclose the business transactions of any person and trade secrets or names of customers". The legislative history of that section and its amendments support the Department of Agriculture's consistent administrative interpretation against disclosure.

Moreover, on numerous occasions there was brought to the attention of Congress the Department's interpretation of section 8 to preclude disclosure of any such data or information; and in 1947 when Congress sought the names and information concerning the transactions of certain traders and the Secretary declined on the ground that the law precluded disclosure, Congress passed a Joint

Resolution (61 Stat. 941) to enable it to obtain such information. Thus, Congress expressly recognized the administrative int<sup>er</sup>pretation given the section.

e. It is also pertinent to note that the most recent Congress passed a new public information law (Public Law 89-487), which was signed by the President on July 4, 1966, and takes effect one year from that date. While that law was designed to give the public at large access, under reasonable regulations, to official records generally, Congress was careful to make the subject of express exemptions precisely the types of documents which the Secretary here seeks to protect under what is in his view applicable existing law.

## ARGUMENT

### I

#### THE ORDER OF THE DISTRICT COURT IS AN APPEALABLE ORDER

Because questions pertaining to appealability of orders in bankruptcy matters based upon the distinction between "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy" have in the past occasioned litigants and courts considerable difficulty, we point out at the inception of this brief that the district court's order is, in our view, clearly an appealable order under section 24 of the Bankruptcy Act, 11 U.S.C. 47. That section provides that "the United States courts of appeals \* \* \* are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact: \* \* \*." Accordingly, orders entered in "proceedings in bankruptcy," as distinguished from "controversies arising in proceedings in bankruptcy," are appealable whether they are interlocutory or final orders. 2 Collier on Bankruptcy (14th ed.), Sec. 24.04, pp. 714-719.

Courts have generally agreed that "proceedings in bankruptcy" are "those matters of an administrative character \* \* \* which are presented in the ordinary course of the administration of the bankrupt's estate." Op. cit., Sec. 24.12, pp. 737-739, and cases cited. On the other hand, "controversies arising in

proceedings in bankruptcy" are those matters" which are not mere steps in the administration of the estate, but which give rise to distinct and separable issues between the trustees and adverse claimants, concerning the right and title to the bankrupt's estate." Id., Sec. 24.28, pp. 766-768.

Included in the category of "proceedings in bankruptcy" are orders directing an examination of a debtor's books and records, or those of a designated witness, so that such orders are appealable whether they are interlocutory or final. In the Matter of Winton Shirt Corporation, 104 F.2d 777 (C.A. 3); 2 Collier on Bankruptcy (14th ed.) Sec. 24.16, p. 742. However, there has developed through judicial interpretation the further restriction on the appealability of an interlocutory order that it must represent an exercise of judicial power affecting the asserted rights of a party and substantially determine some issue, or decide some step in the course of the proceedings. Id., Sec. 24.11, p. 732, and Sec. 24.39, p. 792; Lesser v. Migden, 328 F.2d 47 (C.A. 2).

On these principles it has been held that an interlocutory order entered in connection with an examination under section 21(a) of the Bankruptcy Act was appealable where the Referee had refused to furnish a copy of the transcript of an examination to a creditor who was also examined, In the Matter of Winton Shirt Corporation, supra; where the order denied the Trustee's request for an order directing a witness to answer certain questions and to produce certain documents, In re Bush Terminal Corp., 105 F.2d 156 (C.A. 2); and where the order

denied the motion of a witness to quash the subpoena, In re Equitable Plan Co., 272 F.2d 158 (C.A. 2). This last case is directly in point. There, a witness voluntarily went to New York to testify in a Chapter X proceeding. At the conclusion, he was subpoenaed to appear as a witness in ancillary proceedings in New York in another company. The motion by the witness to quash the subpoena was denied, and he was ordered to appear before the Referee for examination. Holding that the order was appealable as an interlocutory order entered in "proceedings in bankruptcy," the Second Circuit said (at p. 159):

It is true that some interlocutory orders which decide merely procedural matters are held to be non-appealable despite the broad language of section 47(a). \* \* \* We do not consider the present order one of that character. The testimony to be taken may affect the ultimate outcome of the Chapter X proceeding, and we think that the witness is entitled to have the question of his claimed immunity reviewed without having to wait until he has been adjudged in contempt for disobeying the order. \* \* \* That a witness may appeal an order denying his motion to quash a subpoena is the view expressed in Collier on Bankruptcy, 14th ed. Par. 24.16. Judge Miller's dissent at page 959 in [In re Manufacturers Trading Corp., 6 Cir., 194 F.2d 948] also takes that view. 7/

That language is fully applicable here. While the district court's order in this case was an unusual one in that it denied

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7/ The opinion in the Manufacturers Trading Corp. case took the view that denial of a motion to quash the subpoena determined no rights of the parties, a view which the Second Circuit rejected in the Equitable Plan Co. case and which we think is no more applicable in the present case.



the petition for review without passing upon any of the legal issues raised therein and without prejudice to the petitioning Secretary's contentions, its effect was clearly that of determining issues respecting the rights of the parties. For the Referee's order was then for all practical purposes final, and the Secretary was in a position where he was required to comply with what he considered to be an erroneous order of the Referee requiring production or subject himself to possible contempt. We submit that in these circumstances the order of the district court in this case is an appealable order under section 24(a) of the Bankruptcy Act, 11 U.S.C. 47(a), as an interlocutory order in a "proceeding in bankruptcy", upon the authority of 2 Collier on Bankruptcy, Sec. 24.16, and In re Equitable Plan Co., supra.

If for any reason this Court should disagree, then we submit that the order is appealable as a "final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it," within the principle announced by the Supreme Court of the United States in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546-547. In the present case we are dealing solely with ancillary bankruptcy proceedings brought in this jurisdiction only for the purpose of holding section 21(a) examinations, of which that of the Secretary of Agriculture is one. The Secretary is not a party to the main bankruptcy proceedings in the District Court for the Southern District of New York; and there can be no other opportunity in the bankruptcy proceedings for the Secretary to obtain a determination of the validity of the Referee's order to produce on



the issues raised. Accordingly, this is clearly a decision which falls in that class of cases which "finally determine claims of right separable from, and collateral to, rights asserted in the action," and as such are appealable. Id., at p. 546. See also Covey Oil Company v. Continental Oil Company, 340 F.2d 993 (C.A. 10).

## II

### THE SECRETARY WAS ENTITLED TO REVIEW BY THE DISTRICT COURT OF THE LEGAL ISSUES RAISED IN HIS PETITION FOR REVIEW OF THE REFEREE'S ORDER

The peculiar situation in this case is that the district court denied the Secretary's petition for review of the Referee's order (denying the motion to quash or modify and requiring production) without passing upon any of the legal issues raised by the petition for review and "without prejudice to petitioner's contentions." As noted, this left the Secretary in the untenable position of complying with an erroneous order of the Referee without any court review, or subjecting himself to the possibility of a citation for contempt. But he was entitled under the provision of the Bankruptcy Act to a review of the Referee's order by the district court. In section 2(a)(10), 11 U.S.C. 11(a)(10), district courts are given jurisdiction to consider records, findings, and orders certified to the judges by referees and to "confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings." In section 38, 11 U.S.C. 66, the Referee's jurisdiction is spelled out, "subject always to a review by the judge." Specifically, in section 39(c), 11 U.S.C. 67(c), a person

aggrieved by an order of the Referee may within ten days file with the Referee a petition for review of the order by a judge; and General Order No. 47 in bankruptcy provides that, the "judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." In the Bankruptcy Act, therefore, the judge is given no alternative to simply refuse entirely to pass upon a properly presented petition raising legal issues. Moreover, Collier on Bankruptcy (14th ed.) Vol. 2, Sec. 39.18, page 1483, says that "there is an absolute right to review within the terms of § 39c."

There is no question here but that the Secretary is an "aggrieved" person within the meaning of section 39(c). His motion to quash or, in the alternative, to modify the subpoena was based upon legal grounds which, he maintained, entitled him to resist production under the subpoena and the Referee's order for the section 21(a) examination. When the Referee denied the motion to quash and ordered the Secretary to produce in accordance with the terms of the subpoena, that order determined the rights of the Secretary adversely to his contentions and entitled him to petition for review. And the petition was filed within the ten-day limitation in the statute. There was no question raised in the district court that the Secretary was not entitled to petition for review. We find no case holding in these circumstances that the district court has discretion to refuse to pass on the merits of the petition. On the contrary, the decision by this Court in In re Leigh, 78 U.S. App. D.C. 261,

139 F.2d 386, supports the Secretary's position that he has a right to review by the district court. There the Referee denied the bankrupt's motion to vacate certain findings and refused discharge. The bankrupt filed a petition for review of such orders, and the Referee refused to transmit the motion/papers and exhibits to the district court. The bankrupt moved the district court for completion of the record, which motion was denied. On appeal the Court said (139 F.2d at 387):

A bankrupt who seeks a review of an order on a motion is entitled to have the court consider the motion papers and all the exhibits as they are presented to the referee and this is a substantial right.

And in In re Klein's Outlet, 49 F. Supp. 375, 377, the District Court for the Southern District of New York in directing the Referee to prepare a certificate upon petition for review of his order, said:

Upon the filing of the certificate with the court, it will then be incumbent on one of its judges, \* \* \* to determine whether Rose Klein is an aggrieved party and, if so, whether the order authorizing the settlement of the State court action was properly made.

See also In re Albert, 122 F.2d 393, 394 (C.A. 2), where the court said that under General Order XXVII in bankruptcy, which was in existence prior to the amendment to Section 39(c) fixing a ten-day limitation for the filing of a petition, a petition to review if filed within a reasonable time after entry of an order was to be heard "as a matter of right." While the court was there dealing with a question of its power to extend the time for filing the petition, the changing of the time for filing from a reasonable time to ten days could not, without

more, have changed the right to be heard when the petition, as here, was filed as required within the time limited; and Collier says that section 39(c) incorporated into the Act the essence of former General Order XXVII, which was abrogated in 1939. Op. cit., Sec. 39.16, p. 1477.

Moreover, it is well established that the jurisdiction of the district court to review an order of the Referee in Bankruptcy is exclusive and may not be by-passed. In other words, if the aggrieved person does not file a petition for review as provided by the statute, he may not otherwise challenge the validity of the order. In re Chelsea Hotel Corp., 241 F.2d 846 (C.A. 3); California State Board of Equalization v. Sampsell, 196 F.2d 252 (C.A. 9); cf. MacNeil v. Gargill, 231 F.2d 33 (C.A. 1), certiorari denied, 352 U.S. 833.

Accordingly, the statutory scheme calls for review by the district court of the merits of an "aggrieved" person's petition, and this Court should hold that in the present case it was erroneous for the district court to deny the Secretary's petition without passing upon any of the legal issues presented and "without prejudice to petitioner's contentions." But the Court need not send this case back for a determination by the district court of the issues raised by the Secretary, since, in our view, it is clear that the Secretary's exceptions to compliance with the subpoena are based upon such well-founded legal objections to the subpoena and the Referee's order that had the district court ruled on the merits of the petition, it would have been required to order reversal of the

Referee's order of May 10, 1966, and to grant the Secretary's motion to quash or, in the alternative, to modify the subpoena. This Court can now make that determination and direct the district court accordingly.

However, should this Court for any reason be of the view that the issues raised by the Secretary should not be determined in his favor, and on this record he is required to produce documents to the production of which he has objected for the reasons set forth in his motion and the affidavits accompanying that motion, then this Court should remand the case to give the Secretary an opportunity to file a formal claim of privilege.<sup>7a/</sup>

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<sup>7a/</sup> It is a matter of policy, generally, to defer the filing of a formal claim of privilege by the head of an executive department until other objections which may be interposed have been ruled upon by the court. Hence, the matter of filing a formal claim of privilege in this case has not been determined, since there has been no ruling by the district court on the objections raised by the Secretary to the production of the documents called for by the subpoena.

### III

ON THE MERITS, THE SECRETARY IS ENTITLED TO HAVE THE REFEREE'S ORDER REVERSED AND THE SUBPOENA QUASHED OR, IN THE ALTERNATIVE, MODIFIED, IN ACCORDANCE WITH THE PETITION FOR REVIEW.

While we think that the subpoena should be quashed on all the grounds raised by the Secretary before the Referee, and particularly because it shows on its face that it is so broad and sweeping in scope as to be unreasonable and oppressive, there is no doubt that, at the very least, it should be modified to eliminate the bulk of the documents called for, since the Trustee fails to show "good cause", and more than 300,000 of the documents contain information which Congress has in section 8 of the Commodity Exchange Act, 7 U.S.C. 12, protected from disclosure.

The Referee was apparently under the misapprehension, and this most certainly must have affected his decision in this case, that because this was an examination under section 21(a) of the Bankruptcy Act, the "rules and precedents forbidding divulgence or disclosure of information, reports, records and documents, etc., by public officials and public employees", which are "generally upheld in connection with judicial hearings in private litigation", should not be applied here as they are "in matters of litigation" (J.A. 195-196). He cites no authority for such position, and we know of none. On the contrary, reference to section 21 of the Bankruptcy Act shows that the right to take depositions in proceedings in bankruptcy "shall be determined and enjoyed according to the laws of the United States \* \* \* relating to the taking of depositions" (Sec. 21(b)); and "in all proceedings under this title,



the parties in interest shall be entitled to all rights and remedies granted by the Rules of Civil Procedure for the United States District Courts \* \* \* pertaining to discovery, interrogatories, inspection and production of documents, \* \* \* " (Sec. 21(k)).

Scarcely could the law be clearer that a person who is ordered to appear and produce documents for an examination under section 21(a), and upon whom for that purpose a subpoena is served, is entitled to all the protection afforded by the Federal Rules of Civil Procedure and by established legal principles, the same as if he were subpoenaed "in matters of litigation". The requirement for a showing of "good cause" in Rule 34 is, as discussed, infra, (p.38 ), read into Rule 45 for the production of documents; the latter Rule provides for the quashing or modification of a subpoena if it is "unreasonable and oppressive"; and under Rule 26(b) a person may be examined regarding any matter "not privileged".

This subpoena covers a nine-page schedule of documents divided into 19 separate paragraphs calling in general and all-inclusive terms for the production of more than 300,000 documents located in the files of many agencies of the Department of Agriculture in at least a dozen cities throughout the United States. The affidavits of Alex C. Caldwell, Administrator of the Commodity Exchange Act, and Lester P. Condon, Inspector General of the Department of Agriculture, set forth in detail the virtually limitless scope of many paragraphs of the schedule, and the burdensome, oppressive and prejudicial effect that compliance with the subpoena would have upon important programs of the Department. To the extent that the subpoena could be complied with without incurring such burdens, the



Secretary has voluntarily made a substantial number of documents available for the Trustee's inspection (J.A. 146).

The reason advanced by the Trustee to justify such a sweeping subpoena is set forth in his petition for examination of the Secretary and in the transcript of the hearing on the Secretary's motion to quash. In the petition he alleges that Ira Haupt & Co., the bankrupt, suffered losses in excess of \$20,000,000 by reason of the losses of its customer Allied Crude Vegetable Oil Refining Corporation in the cottonseed oil and soybean oil commodity markets; and he asserts that the "Trustee is seeking to determine from this examination [of the Secretary] whether a cause of action exists in the bankrupt arising from losses in the cottonseed oil and soybean oil futures markets" (J.A. 22, 23). At the hearing on January 20, 1966 on the Secretary's motion to quash, the following colloquy took place between the Referee and the Trustee's counsel (J.A. 124-125):

THE REFEREE: I want to get this straight. These claims that you have just enumerated are the causes of action that the Trustee would undertake in the event he found there was evidence to support them, is that the idea?

MR. LOBELL: No, Your Honor. The only question at this point is, who engaged in it? That a cause of action exists is clear.

Thereafter, as a result of numerous examinations made to determine such question, the Trustee sought and was granted authority to bring suit (J.A. 219-221), and on April 11, 1966, suit was brought by him against the New York Produce Exchange, the New York Produce Exchange Clearing Association, and 13 other defendants, including members of the exchange and brokerage houses represented in

membership (J.A. 222-229), and the complaint also named 16 co-conspirators (J.A. 229-231).

A. The Subpoena *Duces Tecum* Should Be Quashed As Being Unreasonable and Oppressive.

The subpoena is so broad and sweeping in scope as to be unreasonable and oppressive on its face, and, therefore, it can not stand. The definition of the word "document" in the subpoena covers not only formal reports, transcripts, records, work papers, tabulations, letters and memoranda, but every scrap of paper in the particular Government files. And each paragraph calls for "all" such documents. This is the prime example of an unreasonable subpoena. And it fails completely to meet the standard of "designated" books, papers, documents or tangible things producible under Rule 45, F.R.Civ.P. No apparent attempt has been made to limit the scope of the subpoena to specific documents or restrict it to specific lines of inquiry.

In demanding "all" documents, this subpoena is in the same category as that in Hale v. Henkel, 201 U.S. 43, which the court struck down as being far too sweeping to be reasonable and as violating the principle of particularity required in a subpoena, stating that it was as "indefensible as a search warrant would be if couched in similar terms" (at p. 77). A subpoena using the term "all" has been proscribed as bad on its face, Sheffield Corp. v. George F. Alger Co., 16 F.R.D. 27, (S.D. Ohio). And a subpoena much narrower than the present one, which sought "all records" relating to eight categories of items, was quashed in Continental Distilling Co. v. Humphrey, 17 F.R.D. 237, 241 (D.D.C.), where the court said:

The subpoena on its face shows that the request for production of documentary evidence by defendant Avis is so broad as to be unreasonable and oppressive, and it must therefore be quashed. (Emphasis supplied).

So, also, the Fifth Circuit in Clay v. Southern Railway Company, 284 F.2d 152 (C.A. 5), struck down a subpoena duces tecum which sought the "entire investigative file" (excluding legal opinions) including the "investigative files for any and all other accidents occurring between trains and vehicles at said crossing for a ten-year period \* \* \* ", stating (at p. 154):

The trial judge was eminently correct in quashing the entire subpoena duces tecum on motion of the railroad. The subpoena was oppressive, failed to properly designate, and failed to show good cause.

Similarly, the court in Public Administrator of the Courts of New York v. Rogers, 26 F.R.D. 118 (S.D.N.Y.), denied a motion under Rule 34 for production by the Attorney General of Government files and records covering "all reports of investigators commissioned by the defendant or by the office of Alien Property" with respect to a specific matter. Although that demand was less broad than the present one, the court denied it, holding (at p. 119):

This motion does not itemize the documents to be examined, but seeks rather to have a general "roving commission" to go through all the records of the office of Alien Property to find out what statements, affidavits, transcripts and other evidence it may have.

This is precisely what the Trustee seeks to do in the present case and on a far broader and more sweeping scale. Moreover, the affidavits of the Administrator of the Commodity Exchange Authority and the Inspector General of the Department of Agriculture demonstrate the burden and injurious consequences which would follow from

compliance with the subpoena. There are sought more than 300,000 documents which may involve six major agencies of the Department of Agriculture, each of which operates independently and maintains separate records. And it appears that such records may be located in the Washington office, at various field offices, and at various federal record centers, and comingled with thousands of unrelated documents. The affidavits set forth the extensive procedures which would be required to comply with the subpoena, including a page by page examination of documents for privileged material; and they also show the great amount of labor which compliance would require with diversion of the services of employees from their regular duties where they are urgently needed.

Because of the sweep of the subpoena, its lack of specification, and the burden its all-inclusiveness imposes, it should be quashed as unreasonable and oppressive. Moreover, the Trustee has failed to show "good cause" for production of most of the documents sought.

B. The Trustee Has Not, And Cannot, Meet His Required Burden of Showing "Good Cause" For Production of the Documents.

The "good cause" requirement of Rule 34 is incorporated into Rule 45, F.R.Civ.P., and places an affirmative burden upon a party seeking documents under the latter rule to make a clear showing of "good cause". Continental Distilling Corp. v. Humphrey, *supra*, citing Barron & Holtzoff, Federal Practice and Procedure, Sec. 1002. See also Bada Company v. Montgomery Ward & Co., 32 F.R.D. 208 (S.D. Cal.). That showing, where any ground exists for protecting the documents, requires a strong showing of necessity. Thus, where a

party sought to invade the files of his adversary in connection with the investigation and preparation of the case, it was held that the necessary "good cause" showing required him to establish that there were "special circumstances" which made it "essential" that the documents be produced for his use. Alltmont v. United States, 177 F.2d 971, 978 (C.A. 3).

And where non-parties are concerned, it appears that the rule requires such parties to bear the burden of annoyance and expense of production only when the documents are not available from other sources. In Bada Company v. Montgomery Ward, supra, the court quashed a subpoena seeking from a witness "all documents" and "all records" pertaining to certain categories. In addition to holding that the subpoena was so broad as to be unreasonable, the court ruled that good cause was not shown, since the documents could likely be obtained from interested parties, stating (32 F.R.D. at 209, 210):

The court is of the opinion that, at this stage of the litigation, the plaintiff has not shown good cause for the objecting witnesses to comply with parts 1 and 2 of the subpoena duces tecum when the material sought may be available to the plaintiff under Rule 34, Federal Rules of Civil Procedure. These witnesses are not parties to the action, and they should not be burdened with the annoyance and expense of producing the documents sought unless the plaintiff is unable to discover them from the defendant.

\* \* \* \* \*

\* \* \* If the plaintiff has "good cause" to require non-litigating witnesses to produce these documents, then certainly it has "good cause" to acquire this information directly from the defendant.

Specifically with respect to public documents and files which strong public policy considerations make confidential, the Supreme Court has held that these are producible only upon a showing of "compelling necessity". United States v. Proctor & Gamble, 356 U.S. 677, 682-683.

The subpoena in this case pulls into its broad grasp thousands of Government documents defined as "any book, record, paper, report, memorandum, communication, letter, tabulation, chart, worksheet, analysis, summary, transcript, or other writing" (J.A. 12). But the Federal Rules of Civil Procedure do not contemplate that sweeping type of production of Government papers. Thus, in Wirtz v. Local Union 160, Hod Carriers, 37 F.R.D. 349, 351 (E.D. Nev.), the court ruled that production of such records and documents would not be required in reponse to a subpoena much narrower and less onerous than the present subpoena, holding:

\* \* \* it is the view of the court that federal discovery processes are not intended to require such wholesale disclosure of government memoranda, reports, communications and statements as is contemplated under the terms of this subpoena.

The bulk of the documents here sought, namely, the daily reports of clearing members, commission merchants and traders, as called for in paragraphs 1, 2 and 3 of the subpoena, investigations of market conditions in paragraph 4, insofar as they were incidental to investigations and operations of specific traders, the communications between Agriculture and the commodity exchanges and other persons, firms and organizations within the demand of paragraphs 8, 9, 10 and 11, information respecting complaints of manipulation of prices called for in paragraph 13, and reports of investigations of various persons and firms as requested in paragraphs 17, 18 and 19 would all separately disclose the "business transactions of any person and trade secrets or names of customers" (J.A. 35-37) and are, therefore, by virtue of the non-disclosure provisions of section 8 of the Commodity Exchange Act, 7 U.S.C. 12, in



a category similar to that of income tax returns which are also protected by statute. In Maddox v. Wright, et al., 103 F. Supp. 400 (D.D.C.), the court vacated a subpoena duces tecum which attempted to compel production of an income tax return, holding that since Congress had provided that tax returns shall be confidential and disclosed only on application of the taxpayer or his attorney, such returns are, in private civil actions, confidential information between the taxpayer and the Government and should not be open to inspection under Rule 34, F.R.Civ.P. The court added that such rule would have no serious consequences, since the information desired could be obtained by intelligent use of other discovery procedures. See also Cooper v. Hallgarten & Co., 34 F.R.D. 482, 483 (S.D.N.Y.), where the court held that, even assuming that tax returns are not privileged, public policy cannot be ignored, and the returns should not be required unless there is a compelling need which cannot be satisfied from other sources.

The most recent case decided by this Court involving production of Government documents for use in private litigation is that of Westinghouse Electric Corp. v. City of Burlington, 122 U.S.App. D.C. 65, 351 F.2d 762, which involved review of a district court order quashing a subpoena duces tecum upon the Attorney General of the United States. The Court ruled that the Government has a great interest in having justice done between litigants, and that it should attempt to produce documents relevant to a fair termination of the litigation. Accordingly, it remanded to the district court with instructions to conduct proceedings to explore the possibilities of accommodating the litigants' interests, " \* \* \* and then



consider whether this subpoena is so oppressive that it cannot be granted, even in modified form." (pp. 70 and 767, respectively). Pertinent to the present case, however, the court followed such direction with the statement that it "would be appropriate for the trial judge to be sure that the defendants had made full use of discovery procedures against the plaintiffs. Such discovery might lighten the load on the Justice Department" (footnote 8).

Upon remand the district court conducted further proceedings and entered an opinion. City of Burlington v. Westinghouse Electric Corporation, 246 F. Supp. 839 (D.D.C.). The court applied the decision of this Court to allow production of certain specified documents, but largely reinstated its prior holding forbidding access to Government records. It specifically ruled that investigation reports of the Federal Bureau of Investigation need not be produced, with language bearing directly upon the point now in issue (at p. 846):

However, this does not mean that the defendants will have access to any Federal Bureau of Investigation reports. The Court feels that the public interest in encouraging cooperation with the Federal Bureau of Investigation and in protecting the results of their investigations from scrutiny, outweighs the defendants' interest in their production. Furthermore, the Court feels that through an examination of the plaintiffs' correspondence and files, and by use of the federal discovery procedures, the defendants can obtain the information they seek. The conclusions and opinions of the Federal Bureau of Investigation are not necessary for the preparation of the defendants' case. (Emphasis supplied.)

To date the Trustee has not shown "good cause" by these standards, and it does not appear that he can do so in light of the fact that he has now brought suit against the New York Produce Exchange, the New York Produce Exchange Clearing Association, officers of those

associations, and several other defendants, at least until he has exhausted his rights of discovery against such adverse parties in an effort to obtain information which he here seeks from the Government files. Since the alleged reason for making such demand upon the Government was to determine whether he had a cause of action, or against whom he might have a cause of action, to recover for losses suffered in the commodity markets, that reason has lost its weight now that he has in fact brought such a suit. Should he contend that he must still determine against what other persons he may have a cause of action, that contention cannot constitute "good cause", considering the nature of the documents here sought, when there has been no showing by the Trustee that he cannot get the documents from any other source, particularly through exhaustion of discovery against the named defendants in his New York suit and the 16 alleged "co-conspirators" named in that complaint (J.A. 222-231).

A mere allegation that subpoenaing the information sought from the files of the defendants in the New York action would be less efficient or convenient or more expensive from the petitioner's viewpoint would in no way constitute a showing of "good cause." For example, in Lichter v. Mellon-Stuart Company, 24 F.R.D. 397, 399 (W.D. Pa.), the court held that documents were not subject to production simply because proof of a party's case "might be facilitated."

In determining "good cause" in this case there should also be considered the fact that many of the documents demanded are the subject of well-recognized privileges, as discussed in the immediate following subsection.

C. Many of the Documents Sought Are the Subject of Well Recognized Privileges Against Disclosure.

In their affidavits both Mr. Caldwell (J.A. 38-39) and Mr. Condon (J.A. 47-48) state that many of the documents called for, particularly those in the investigative files, contain intra-agency and inter-agency advisory opinions and matter going to policy considerations. Such documents have long been recognized as the subject of a well-established privilege. As early as 1876, a federal court for the District of Maryland held in Gardner v. Anderson, 9 Fed. Cas. 1158, No. 5220:

Communications in writing passing between officers of the Government, in the course of official duty, relating to the business of their offices, are privileged against disclosure, on the ground of public policy, and their production will not be compelled by court of law or equity.

More recently in Machin v. Zuckert, 114 U.S.App.D.C. 335, 338, 316 F.2d 336, 339, certiorari denied, 375 U.S. 896, this Court, with reference to production of documents internal to an agency, said:

Also, a recognized privilege attaches to any portions of the report reflecting Air Force deliberations or recommendations as to policy that should be pursued.

See also Boeing Airplane Co. v. Coggeshall, 108 U.S.App.D.C. 106, 112, 280 F.2d 654, 660; Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939, 141 Ct. Cl. 38; Clark v. Pearson, 238 F. Supp. 495 (D.D.C.).<sup>8/</sup>

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<sup>8/</sup> "In the main the materials sought by the subpoena are the product of the investigative function of the Department of Justice including the Federal Bureau of Investigation. The scope of the subpoena is so extensive as to embrace any and all papers concerning events described in the Pearson article which may have been prepared by employees of the Department of Justice for use within that Department, including investigative files, reports, memoranda, and even advisory recommendations preliminary to action or non-action by the department. Traditionally a privilege has been recognized for materials produced pursuant to the investigative functions of government agencies, 8 Wigmore, Evidence §2378 (McNaughton Rev. 1961), and it should be recognized here." (pp. 495-496)

The affidavits also pointed out (J.A. 37-38, 45-47) that many of the documents, again particularly those in the investigative files, contain information given to the agency with the understanding that it will be held confidential; that persons who are not themselves under investigation give information to the Government in confidence; that in many cases where subpoena power is not available to the agency, the success of the investigation depends upon the agency's ability to obtain voluntary co-operation from the persons interviewed; and that disclosure of the sources or of such information would seriously impair the effectiveness of the agency's investigative function. This, too, is information which has been held privileged from disclosure. Decisions upholding the privilege with respect to information voluntarily given recognize that a breach of this confidence would have a deterrent effect upon witnesses with attendant prejudice to the public, since disclosure would impede the effective discharge of responsibility by agencies whose proper functioning depends upon the ability adequately to secure information which must be voluntarily given. Vogel v. Gruaz, 110 U.S. 311; Machin v. Zuckert, supra.

It is entirely reasonable, as set forth in the affidavits, that were the identities of persons who have given information to the Government voluntarily in such investigation interviews, together with the information itself, revealed to others, the informants might be sued or made to suffer economic reprisal, and sources of such information for the Government vanish.

There is also applicable to some of the documents sought here the privilege which protects an attorney's work product. Hickman v. Taylor, 329 U.S. 495. While this examination of the Secretary is

not made in a suit between the Trustee and the Secretary, a number of documents called for are work papers of lawyers in the Department of Agriculture and the Department of Justice in connection with the possibility of bringing administrative or judicial action against various persons (J.A. 38-39). The investigations conducted by the Office of Inspector General are primarily concerned with developing evidence for use in criminal, civil and other legal actions; the activities of that Office are similar in many respects to those of other investigating agencies of the Government, including the FBI; and information received from agencies such as the FBI and Internal Revenue Service becomes an integral part of the files of that Office (J.A. 45).

In addition, some of the matters investigated, and within the apparent scope of the subpoena, are pending in the Department of Justice where they are under consideration for possible institution of civil or criminal action (J.A. 47); and in that situation the documents pertaining to such investigations are protected from disclosure. Capitol Vending Co. v. Baker, 35 F.R.D. 510, 510-511 (D.D.C.).

While documents which are the subject of specifically afforded protection are usually found privileged within the context of a formal claim of privilege,<sup>9/</sup> the required showing of "good cause" or "necessity" must first be made before the court is required to reach

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<sup>9/</sup> See e.g., Machin v. Zuckert, supra; Boeing Airplane Co. v. Coggeshall, supra; Kaiser Aluminum & Chemical Corp. v. United States, supra. For the reason why a determination as to a formal claim of privilege has not yet been made in this case, see discussion, supra, page 32, n. 7a.



a claim of privilege. As the decision in United States v. Reynolds, 345 U.S. 1, shows, there is no need for a "showdown" on a formal claim of privilege if the information is, or may be, otherwise available. There, where a formal claim of privilege was made, the Court said that "[h]ere, necessity was greatly minimized by an available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege. By their failure to pursue that alternative, respondents have posed the privilege question for decision with the formal claim of privilege set against a dubious showing of necessity" (at p. 11). The strong showing of "necessity" which must be made when there are involved, as here, documents which could come within a claim of privilege has not been made by the Trustee in this case.

D. The Bulk of the Documents Called for By the Subpoena Are Protected From Disclosure By the Provisions of Section 8 of the Commodity Exchange Act, 7 U.S.C. 12.

1. The history of section 8 of the Act and its amendments support the Department of Agriculture's consistent administrative interpretation against disclosure.

The principle objection to the subpoena, apart from its unreasonable and oppressive character as discussed, supra, (pp.36-38) is the fact that it demands vast numbers of documents which Congress has determined to be confidential under section 8 of the Commodity Exchange Act, 7 U.S.C. 12. <sup>10/</sup> That section provides:

For the efficient execution of the provisions of this chapter, and in order to provide information for the use of Congress, the Secretary of Agriculture may make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade, whether prior or subsequent to the enactment of this chapter, and may publish from time to time, in his discretion, the result of such investigation and such

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<sup>10/</sup> Act of June 15, 1936, 49 Stat. 1491.

statistical information gathered therefrom as he may deem of interest to the public, except data and information which would separately disclose the business transactions of any person and trade secrets or names of customers: \* \* \* (Emphasis added).

The affidavits in this case show that materials sought in paragraphs 4, 8, 9, 10, 11, 13, 17, 18 and 19, and particularly the daily reports of clearing members, commission merchants and traders called for in paragraphs 1, 2 and 3 of the subpoena, and amounting to more than 300,000 documents, would reveal separately the business transactions and trade secrets or names of customers of persons and firms trading on the commodity markets. This provision of the Act, and its predecessors in The Future Trading Act, 42 Stat. 190<sup>11/</sup> and in The Grain Futures Act, 42 Stat. 1003,<sup>12/</sup> have been a part of the law for more than 40 years and have been construed by the Department of Agriculture from their inception as prohibiting disclosure of business transactions and trade secrets or names of customers of any person, except as necessary in proceedings under the Act or as specifically authorized by the Act.

The aforementioned Acts were passed to provide federal supervision and regulation of commodity exchanges and to eliminate therefrom the manipulation of prices. While Congress did not favor speculation on the exchanges, it recognized that a substantial portion of the transactions performed an economically useful and necessary function by enabling producers, dealers, exporters, millers and other manufacturers of grain products to engage in legitimate hedging transactions, designed to insure them against fluctuations

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<sup>11/</sup> Act of August 24, 1921.

<sup>12/</sup> Act of September 21, 1922.



in prices.<sup>13/</sup> Thus, Congress has in 7 U.S.C. 6a(3) expressly exempted "bona fide hedging transactions" from regulations issued under 7 U.S.C. 6a(1) and designed to eliminate or prevent "excessive speculation in any commodity." Congress also recognized that hedging is impossible if there are no traders willing to speculate on prospective fluctuations in the commodity markets.<sup>14/</sup> Therefore, the legislative concern was directed not at the typical traders willing to take a chance on their judgment of the future, but at manipulators and irresponsible gamblers who wrought wide fluctuations in prices. A large percentage of the trading on the commodity exchanges is thus not only innocuous but, indeed, beneficial and necessary for the proper operation of the commodity markets.<sup>15/</sup> Congress realized, therefore, that reports filed with a regulatory agency by traders had to be made confidential, not only to protect the business privacy of "hedgers" and "legitimate capitalists", but also to assure the accuracy of those reports.<sup>16/</sup> Congress also understood that hedging transactions were not practically feasible if they had to be conducted in the public eye.<sup>17/</sup> The practical need for keeping

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<sup>13/</sup> See e.g., Sen.Rept. No. 212, 67 Cong., 1st Sess., p. 4; Sen. Rept. No. 871, 67th Cong., 2d Sess., pp. 3-4; 61 Cong. Rec. 1321-1322, 1328, 4762, 4768; 62 Cong. Rec. 9447; 80 Cong. Rec. 6161, 8012.

<sup>14/</sup> 61 Cong. Rec. 1328.

<sup>15/</sup> As the Senate Committee report on the bill which became The Grain Futures Act of 1922 pointed out, public speculation helps carry the risk for the producers, dealers and millers who wish to hedge their cash grain transactions. S. Rept. No. 871, supra, p. 3.

<sup>16/</sup> See 61 Cong. Rec. 1321.

<sup>17/</sup> "In the hearings it was reported that if these matters were made public it would give information to various competitors who operate on the various boards of trade." 61 Cong. Rec. 1321.

this information confidential was again brought to the attention of Congress during the hearings preceding the enactment of the Commodity Exchange Act.<sup>18/</sup>

The confidentiality provisions of the Act reflect the statutory distinction between "legitimate" or "necessary" speculators and outright manipulators. A proviso in 7 U.S.C. 12 permits the Secretary to issue such reports

\* \* \* as he may deem necessary relative to the conduct of any board of trade or of the transactions of any person found guilty of violating the provisions of this chapter under the proceedings prescribed in sections 8, 9, and 15 of this title \* \* \* .<sup>19/</sup>

Similarly, 7 U.S.C. 12a(6), added in the Commodity Exchange Act of 1936, provides that the Secretary of Agriculture is authorized to communicate to the proper committee or officer of any contract market and to publish

\* \* \* the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgment of the Secretary of Agriculture disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers and consumers.

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<sup>18/</sup> At hearings in April 1934 the Chief of the Grain Futures Administration of the Department of Agriculture testified that "[t]o disclose names of large traders and their market positions would, of course, place the large traders at a great disadvantage and would make operation impossible." And he said, further, that while the Administration had given Congress information in connection with investigations in response to Senate resolutions, numbers were assigned to the traders, so that transactions of different traders could be followed through, but names were not given. Regulation of Grain Exchanges, Hearings before the Committee on Agriculture, House of Representatives, 73rd Cong., 2d Sess., on H. R. 8829, pp. 22-23.

<sup>19/</sup> 7 U.S.C. 8, 9 and 15 provide for administrative procedures, subject to judicial review, for the suspension or revocation of the designation of any board of trade as a "contract market" and for the exclusion of traders from the privileges of contract markets in the event of the violation of the Act or the rules and regulations issued thereunder by a board of trade. They also provide for suspension or revocation of registration of commission merchants and floor brokers.

A third exception to the confidentiality rule of 7 U.S.C. 12 was added in December 1947 as the result of an incident which in some aspects parallels the problem now under scrutiny.<sup>20/</sup> In that month the Senate Committee on Appropriations served on the then Secretary of Agriculture (now Senator) Clinton P. Anderson a subpoena duces tecum directing him to turn over to the Committee in executive session the names and separate business transactions of persons trading in commodity futures.<sup>21/</sup> Secretary Anderson appeared in compliance with the subpoena but stated that he could not release the information to the Committee because it contained or was based on "reports obtained currently under authority of the Commodity Exchange Act," and, therefore, was confidential under 7 U.S.C. 12.<sup>22/</sup> He suggested, however, the approval of a Joint Resolution which would authorize him to make such data available to the public at large.<sup>23/</sup>

The Joint Resolution ultimately adopted by Congress (61 Stat. 941, 7 U.S.C. 12-1) followed Secretary Anderson's suggestion to pass legislation authorizing disclosure to congressional committees and providing at the same time for full publicity. It contains two features: First, it authorizes the Secretary of Agriculture to make public in his discretion, i.e., even when the requirements of 7 U.S.C. 12 and 12a(6) are not met, the names and addresses of all traders on

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<sup>20/</sup> See 93 Cong. Rec. 11612-11621, 11740-11743.

<sup>21/</sup> 93 Cong. Rec. 11612-11613. The reason for this demand was the belief of the Committee that unrestricted speculation was driving up the prices of commodities for the purchase of which by the Government the Committee had to make appropriations. 93 Cong. Rec. 11616.

<sup>22/</sup> 93 Cong. Rec. 11616.

<sup>23/</sup> 93 Cong. Rec. 11613, 11614-11615, 11616.

the boards of trade of the commodity markets and any other information in the possession of the Department of Agriculture relating to the amount of commodities purchased and sold by each such trader. Second, it requires the Secretary, when requested by a congressional committee acting within the scope of its jurisdiction, to furnish to such committee and to make public the names and addresses of all traders on commodity exchanges with respect to whom the Secretary has information and any other information in the Department's possession relating to the amounts of commodities purchased and sold by each such trader.

In summary, section 8 of the Act vests the Secretary with authority and discretion to make public disclosure of certain classes of confidential information in three instances. First, 7 U.S.C. 12 allows him to issue reports concerning persons "found guilty" of violating certain sections of the Act. As stated in paragraph 3(c) of the Caldwell affidavit any information pertaining to this exception is a matter of public record and already available to petitioner in the Office of the Hearing Clerk of the Department (J.A. 27). Second, 7 U.S.C. 12a(6) permits the Secretary to publish the full facts concerning any transaction or market operation which in his judgment disrupts or tends to disrupt any market or is harmful or against the best interests of producers and consumers. Third, 7 U.S.C. 12-1 (the 1947 amendment) authorizes the Secretary to disclose and make public in his discretion the names and addresses of all traders on the boards of trade on the commodity markets, and any other information in the possession of the Department of Agriculture as to the amount of commodities purchased and sold by each trader.

For the reasons stated in detail in paragraphs 7 through 14 of the Caldwell affidavit (J.A. 30-35) the Secretary has found no justification for the exercise in this proceeding of the discretion available to him under the above provisions. Because of their elaborate treatment in the affidavit these reasons will be only briefly stated here: Should the Secretary make disclosure of any information to the Trustee under 7 U.S.C. 12a(6) and 7 U.S.C. 12-1, it would be incumbent upon him to make the same information available to the public generally and as to 12-1 with respect to all the traders in the commodities involved on the contract markets during the pertinent period. This is so because under 7 U.S.C. 12a(6) his discretion to disclose information is conditioned upon the requirement that he "publish" it, and 7 U.S.C. 12-1 similarly requires him to "disclose and make public" any information released (J.A. 30).

Making public disclosure of all of the documents sought by the subpoena, of course, besides being a tremendous and costly undertaking, would unfairly prejudice many innocent traders in the commodity markets. It would also be extremely damaging to all traders in the markets in that their business transactions and "hedging" activities would be exposed to public scrutiny, thus allowing others to profit from knowledge of their trading patterns and methods of operation. Public disclosure would also weaken the confidence of traders in the ability or intention of the Authority to safeguard present or future information submitted to the Authority with the understanding that it will be kept confidential. Such a loss of confidence could result in a reluctance among traders to make full and candid disclosures to the Authority with obvious prejudice to the latter's administration of the Act (J.A. 30-34).



For all of these reasons, and others stated in the affidavits, the information sought by petitioner's subpoena is, to the extent that it is subject to section 8 of the Act, not subject to disclosure in this proceeding. The history of the Act, its predecessors, and its amendments, require and confirm this conclusion.

2. The administrative interpretation of section 8 has been expressly recognized and approved by Congress.

In Bartlett Frazier Co. v. Hyde, 56 F.2d 245 (N.D. Ill.), a suit challenging the Secretary's authority to require the filing of current and daily reports not related to any specific investigation, the district court upheld the Secretary's authority to issue such regulations, on the ground that he could not otherwise intelligently perform his statutory duties. The Court of Appeals for the Seventh Circuit affirmed, holding specifically that the information so obtained was confidential pursuant to 7 U.S.C. 12. 65 F.2d 350, 352. The Supreme Court denied a petition for a writ of certiorari sub. nom. Bartlett Frazier, et al. v. Wallace, 290 U.S. 654.

During the hearing which preceded the enactment of the Commodity Exchange Act of 1936, witnesses representing the Department of Agriculture repeatedly referred to the administrative interpretation of The Grain Futures Act to the effect that all information relating to the business transactions of specific persons, trade secrets and the names of customers was made confidential by 7 U.S.C. 12.<sup>24/</sup> The

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<sup>24/</sup> For example, during the hearings in April 1934, the Chief of the Grain Futures Administration testified that under section 8 of The Grain Futures Act (which contained the identical prohibition as in section 8 of the Commodity Exchange Act, 7 U.S.C. 12) Agriculture officials were prohibited from disclosing the names of traders unless the traders were guilty of some violation, in which case the names were disclosed through public hearings as then provided for in section 6 of the Act of 1922. Regulations of Grain Exchanges, supra, p. 24. Also at hearings in February 1935, representatives of Agriculture refused to disclose to the Committee names of individuals and names of (continued on page 55)

Bartlett Frazier litigation also was brought to the attention of the House Committee on Agriculture.<sup>25/</sup> When Congress, in 1936, amended The Grain Futures Act substantially and re-enacted it as the Commodity Exchange Act, it did not amend 7 U.S.C. 12. The Secretary's new power under 7 U.S.C. 12a(6) to make certain disclosures is based on the premise that without this specifically granted authority this information would be confidential under 7 U.S.C. 12. Also the enactment of 7 U.S.C. 12-1 in 1947 reflected Congressional agreement with the administrative position that the information sought by the committee was confidential under the then existing law.<sup>26/</sup> In these circumstances, it can be fairly stated that the enactment of the Commodity Exchange Act and of 7 U.S.C. 12-1 constitute Congressional ratification of the earlier administrative and judicial interpretations. See Allen v. Grand Central Aircraft Co., 347 U.S. 535, 544-545, and the authorities there cited.

It follows that to the extent that the files of the Commodity Exchange Authority contain data and information, obtained pursuant to any reporting requirement based on the Act "which would separately disclose the business transactions of any persons or trade secrets or names of customers", they may be made available only in compliance

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<sup>24/</sup> (continued) customers on a list for future investigation on the ground that, since the persons on the list had not been found guilty of violating the Act, the Secretary did not have authority to disclose the names of the individuals concerned. Regulation of Commodity Exchanges, Hearings before the Committee on Agriculture, House of Representatives, 74th Cong., 1st Sess., on H. R. No. 3309, pp. 67-69

<sup>25/</sup> Regulation of Grain Exchanges, supra, p. 48.

<sup>26/</sup> In connection with the enactment of 7 U.S.C. 12-1, Bartlett Frazier Co. v. Hyde, supra, was again brought to the attention of Congress. See Solicitor Hunter's Opinion for the Secretary, 93 Cong. Rec. 11617.



with the provisions of 7 U.S.C. 8a(6) and 7 U.S.C. 12-1. In other words, the Department of Agriculture may not give any person access to those data unless it makes public the names and addresses of all traders of those commodities and the amounts of goods sold or purchased by them. 7 U.S.C. 12-1.

It is respectfully submitted that this recognition by Congress that information obtained by the Department of Agriculture is confidential and immune from disclosure under section 8 of the Act should preclude its production in this case.

3. The case of Rosee v. Board of Trade of the City of Chicago, 35 F.R.D. 512, 36 F.R.D. 684, (N.D. Ill.), is not authority for the production sought here.

In connection with the Secretary's position below for non-disclosure under the provisions of section 8 of the Commodity Exchange Act, the Trustee relied heavily upon Rosee v. Board of Trade of the City of Chicago, 35 F.R.D. 512, and 36 F.R.D. 684 (N.D. Ill.). There, the plaintiff alleged in substance that the Chicago Board of Trade and various individuals conspired wrongfully to deprive him of his membership in the Board of Trade and to destroy his business as a commodity trader. Two of the defendants named in the complaint were employees of the Commodity Exchange Authority, who were alleged to have participated in the conspiracy and to have used their positions as employees of the Authority to advance the purposes of the conspiracy.

Rosee served a subpoena duces tecum on Roger Harper the official in charge of the Authority's Chicago, Illinois, office, commanding production of three categories of documents: (1) reports, intra-departmental correspondence, and miscellaneous data of Baggott and

Morrison, a futures commission merchant through whom Rosee traded, its principals, and complaints made by or involving the plaintiff; (2) audit reports and worksheets prepared by the Commodity Exchange Authority relating to the firm of Baggott and Morrison; and (3) copies of daily reports filed with the Authority by Baggott and Morrison and a number of other individuals over approximately a two year period.

Harper moved to quash the subpoena on the ground, among others, that the production of certain of such documents was prohibited by section 8 of the Act in that they contained "data and information which would separately disclose the business transactions of any person and trade secrets or names of customers." The district court rejected that ground on the basis that the publication prohibited by the Commodity Exchange Act does not relate to disclosure pursuant to discovery proceedings under the Federal Rules of Civil Procedure and subject to supervision by the court.

We cannot agree with that holding. In the first place, it does not appear that the Rosee decision took into account the Seventh Circuit's ruling in Bartlett Frazier Co., et al. v. Hyde, 65 F.2d 350, 352, that section 8 " \* \* \* forbids the revealing by the Secretary and his assistants of individual trades and of customers." Nor does it appear that the court considered the history of the Act, its predecessors, and the ratification by Congress of the Secretary's long-standing position that such information is immune from disclosure.

Moreover, there is a clear public policy against disclosure evinced by the statute, which should be applicable in the case of discovery under the Federal Rules, just as the public policy against disclosure of income tax returns as set forth in the Internal Revenue Code <sup>27/</sup>

is applicable to discovery proceedings. In this respect the holding in Rosee is contrary to that of the District Court for the District of Columbia in Maddox v. Wright, supra, where the court, in vacating a subpoena for production of income tax returns, quoted with approval (at. p. 400) the following language from O'Connell v. Olsen, et al., 10 F.R.D. 142, 143 (N.D. Ohio):

The Internal Revenue Code, 26 U.S.C.A. § 55, and regulations issued thereunder provide that tax returns shall be confidential and disclosed only upon application of the plaintiff or his attorney in fact. No provision is made for the production of such returns upon order of a Federal Court. Until such provision is made, this section of the Court has been and is of the opinion that such returns are, in private civil actions, confidential information between the taxpayer and the Government and should not be open to inspection under Rule 34, Federal Rules of Civil Procedure, 28 U.S.C.A. Such a ruling is in accord with previous holdings that documents which have been declared confidential by Federal department rulings are not open to discovery under Rule 34. 2 Moore's Federal Practice 2641, F.N. 1.

In any event, Rosee is clearly distinguishable from the present case on the grounds that in Rosee (1) two employees of the Commodity Exchange Authority were defendants as alleged participants in a conspiracy against Rosee, and misconduct allegedly involved sending false reports to their superiors or otherwise falsifying records and reports prepared under their supervision, and allegations against these defendants could only be tested and proved by documents in the possession of the Commodity Exchange Authority; (2) the subpoena basically requested information concerning parties to the litigation in the firm of Baggott and Morrison and its co-partners who were named as defendants; and (3) the subpoena in Rosee was much narrower than the production order in the present case. It follows that the Rosee decision is plainly not authority for compliance with the present subpoena.

E. In Its New Public Information Law Congress Has Expressly Protected Certain Types of Public Documents.

Before closing this brief, it is pertinent to note that in enacting a new public information bill (S. 1160), which was signed

by the President on July 4, 1966 (Pub. L. 89-487),<sup>28/</sup> Congress specifically protected from disclosure certain types of public records and documents. That Act amended section 3 of the Administrative Procedure Act (5 U.S.C. 1002), to clarify and protect the right of the public to information. The statute provides, among other things, for making available for public inspection and copying, in accordance with published rules, agency opinions and orders, and for making available to any person, also in accordance with published rules, identifiable records of the agency. In sum, it is a public records law giving the public at large, under reasonable regulations, access to official records generally.

However, what we are most concerned with here are the exemptions in subsection (e) of the Act, which provides that the provisions of the Act shall not be applicable to matters that are (1) specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy; \* \* \* (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential; (5) inter-agency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency; \* \* \* (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; \* \* \*.

As pointed out by the House Committee on Government Operations, "there may be legitimate reasons for non-disclosure, and S. 1160 is designed to permit non-disclosure in such cases." H. Rept. No. 1497,

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<sup>28/</sup> The effective date of the statute is July 4, 1967.

89th Cong., 2d Sess., pp. 5-6. In discussing these exemptions the House Committee said with respect to exemption (3) that there are nearly 100 statutes or parts of statutes which restrict public access to specific Government records,<sup>29/</sup> and the Act does not modify these. Id., at p. 10.

Concerning the trade secrets and commercial or financial exemptions in clause (4), the Committee noted (Ibid.):

This exemption would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would include business sales, statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. It would include information customarily subject to the doctor-patient, lawyer-client, or lender borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.

In connection with the exemption in clause (5) of inter-agency and intra-agency memoranda and letters, the Committee said (Ibid.):

Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl." Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. (Ibid.).

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<sup>29/</sup> As discussed, supra, (pp.47-56), section 8 of the Commodity Exchange Act, 7 U.S.C. 12, is one of those statutes.



While the purpose of the Act is to give the country an effective public information law, Congress was mindful of the need for protecting Government information in a number of areas where protection from disclosure now exists, and took appropriate steps to exempt that information from the operation of the statute. And, significantly, when President Johnson signed this legislation he said:

\* \* \* a democracy works best when the people have all the information that the security of the Nation permits. \* \* \*

At the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets. A citizen must be able in confidence to complain to his Government and to provide information, just as he is--and should be--free to confide in the press without fear of reprisal or of being required to reveal or discuss his sources.

\* \* \* Officials within Government must be able to communicate with one another fully and frankly without publicity. They cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions.

I know that the sponsors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of information. Both are vital to the welfare of our people. 30/

Thus, the Legislative arm of the Government recognizes the Executive branch's need to keep certain information free from disclosure, and, we submit, the Judicial branch should be no less cognizant of this necessity.

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30/ See Weekly Compilation of Presidential Documents, Volume 2, Number 27, pp. 887-917.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the order of the district court should be vacated with instructions to the district court to reverse the order of the Referee in Bankruptcy of May 10, 1966, and grant the Secretary's motion to quash, or, alternatively, to modify the subpoena.

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NOVEMBER 1966.



## APPENDIX

Pertinent provisions of the Bankruptcy Act:

Section 2(a)(10), 11 U.S.C. 11(a)(10), provides:

§ 11. Creation of courts of bankruptcy and their jurisdiction

(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, \* \* \* with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, \* \* \* to \* \* \*

(10) Consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings;

Section 21(a), (b) and (k), 11 U.S.C. 44(a), (b) and (k) provides:

§ 44. Evidence

(a) The court may, upon application of any officer, bankrupt, or creditor, by order require any designated persons, including the bankrupt and his or her spouse, to appear before the court or before the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt: \* \* \*

(b) Except as herein otherwise provided, the right to take depositions in proceedings under this title shall be determined and enjoyed according to the laws of the United States now in force, or such as may be hereafter enacted, relating to the taking of depositions.

\* \* \* \* \*

(k) In all proceedings under this title, the parties in interest shall be entitled to all rights and remedies granted by the Rules of Civil Procedure for the United States District Courts established from time to time by the Supreme Court pertaining to discovery, interrogatories, inspection and production of documents, and to the admission of execution and genuineness of instruments: \* \* \*

Section 24(a) and (b), 11 U.S.C. 47(a) and (b),  
provides:

§ 47. Jurisdiction of appellate courts

(a) The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: \* \* \*

(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

\* \* \*

Section 38, 11 U.S.C. 66, provides:

§ 66. Same; jurisdiction

Referees are hereby invested, subject always to a review by the judge, with jurisdiction to \* \* \*

Section 39(c), 11 U.S.C. 67(c), provides:

§ 67. Duties of referees; prohibition against practice of law; review of orders

(a) Referees shall \* \* \* (6) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts and secure the return of such papers after they have been used, \* \* \*

(c) A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within such ten-day period may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest.

Pertinent provisions of the Commodity Exchange Act:

Section 8, 7 U.S.C. 12, provides:

§12. Investigations and reports by Secretary

For the efficient execution of the provisions of this chapter, and in order to provide information for the use of Congress, the Secretary of Agriculture may make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade, whether prior or subsequent to the enactment of this chapter, and may publish from time to time, in his discretion, the result of such investigation and such statistical information gathered therefrom as he may deem of interest to the public, except data and information which would separately disclose the business transactions of any person and trade secrets or names of customers: PROVIDED, That nothing in this section shall be construed to prohibit the Secretary of Agriculture from making or issuing such reports as he may deem necessary relative to the conduct of any board of trade or of the transactions of any person found guilty of violating the provisions of this chapter under the proceedings prescribed in sections 8, 9 and 15 of this title: PROVIDED FURTHER, That the Secretary of Agriculture in any report may include the facts as to any actual transaction. The Secretary of Agriculture, upon his own initiative or in cooperation with existing governmental agencies, shall investigate marketing conditions of commodity and commodity products and byproducts, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges. He shall likewise compile and furnish to producers, consumers, and distributors, by means of regular or special reports, or by such methods as he may deem most effective, information respecting the commodity markets, together with information on supply, demand, prices, and other conditions in this and other countries that affect the markets.

Section 8-1, 7 U.S.C. 12-1, provides:

§ 12-1. Disclosure of names of traders on the commodity markets by Secretary

Notwithstanding the provisions of section 12 of this title or of any other law, the Secretary of Agriculture may, in his discretion, from time to time disclose and make public the names and addresses of all traders on the boards of trade on the commodity markets with respect to whom the Secretary has information, and any other information in the possession of the Department of Agriculture relating to the amount of commodities purchased or sold by each such trader; and when requested by any committee or either House of Congress, acting within the scope of its jurisdiction, shall furnish to such committee and traders on such boards of trade with respect to whom the Secretary has information, and any other information in the possession of the Department of Agriculture relating to the amounts of commodities purchased or sold by each such trader.

Section 8a(6), 7 U.S.C. 12a(6), provides:

§ 12a. Registration of commission merchants and brokers; fees; rules and regulations; publication of harmful acts

The Secretary of Agriculture is authorized  
\* \* \*

(6) to communicate to the proper committee or officer of any contract market and to publish, notwithstanding the provisions of section 12 of this title, the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgment of the Secretary of Agriculture disrupts or tends to disrupt any market or is otherwise harmful or against the best interest of producers and consumers.

Federal Rules of Civil Procedure:

Rule 26. Depositions Pending Action.

\* \* \* \* \*

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, \* \* \*

\* \* \* \* \*

Rule 30. Depositions Upon Oral Examination.

\* \* \* \* \*

(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, \* \* \*; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

Rule 45. Subpoena.

\* \* \* \* \*

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (a) quash or modify the subpoena if it is unreasonable and oppressive, \* \* \*

\* \* \* \* \*

(d) Subpoena for Taking Depositions; \* \* \*

(1) Proof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 and subdivision (b) of this Rule 45.

\* \* \* \* \*





111

**BRIEF FOR APPELLEE AND CROSS-APPELLANT,  
CHARLES SELIGSON, TRUSTEE IN BANKRUPTCY  
OF IRA HAUPT & CO., BANKRUPT**

---

**IN THE  
United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

No. 20478

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE,  
*Appellant,*

*v.*

CHARLES SELIGSON, TRUSTEE IN BANKRUPTCY  
OF THE ESTATE OF IRA HAUPT & CO.,  
*Appellee.*

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No. 20482

CHARLES SELIGSON, TRUSTEE IN BANKRUPTCY  
OF THE ESTATE OF IRA HAUPT & CO.,  
*Appellant,*

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*Appellee.*

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APPEAL AND CROSS-APPEAL FROM AN ORDER OF THE UNITED  
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals  
for the District of Columbia Circuit

**FILED DEC 30 1966**

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*Nathan J. Paulson*  
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### Statement of Questions Presented

In the opinion of Appellee, the questions presented are:

1. Whether Section 8 of the Commodity Exchange Act, 7 U.S.C. Section 12, prohibits production of documents in response to a subpoena *duces tecum*.

2. Whether the Referee in Bankruptcy and the District Court properly concluded that there was good cause for the production of documents under the subpoena *duces tecum* and that it was not burdensome and oppressive to the Secretary of Agriculture.

3. Whether the District Court erred in failing to explicitly confirm in all respects the Referee's order denying the Secretary's motion to quash or modify the subpoena *duces tecum*.

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IN THE  
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APPEAL AND CROSS-APPEAL FROM AN ORDER OF THE UNITED  
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**BRIEF FOR APPELLEE AND CROSS-APPELLANT,  
CHARLES SELIGSON, TRUSTEE IN BANKRUPTCY  
OF IRA HAUPT & CO., BANKRUPT**

**Counter-Statement of the Case**

In addition to the facts contained in Appellant's Statement of the Case, the following points are relevant to a consideration of the questions presented:

On or about November 14, 1963, there began two weeks of tumultuous activity in the soybean and cottonseed oil futures markets on the Chicago Board of Trade and the



New York Produce Exchange (J.A. 99, 101, 238-250). There were enormous financial losses (J.A. 53, 101, 214, 243). It was concededly the worst financial disaster arising out of futures trading of soybean and cottonseed oil in the history of the exchanges involved, and indeed, the worst disaster of its type in the United States (J.A. 96). Prior thereto, during the year 1963 and continuing through November 1963, the cottonseed oil futures market assumed proportions far beyond anything which had ever previously occurred in terms of the volume and nature of the trading, the concentration of open interest and opening of new warehouse capacity (J.A. 58-59, 99, 101, 238-250). The soybean oil market was characterized as having the same over-expanded features (J.A. 100).

During the fall of 1963, one trader, Anthony De Angelis, held (through one company or another) as much as 90% of the open long position in cottonseed oil futures (J.A. 240-241). In the far broader soybean oil market, De Angelis built his position to roughly 23% of the open long position (J.A. 100).

In July 1963, Ira Haupt & Co. became a broker for much of De Angelis' trading on the Produce Exchange and the Board of Trade (J.A. 238-240).

Commencing on or about November 14, 1963, for no apparent reason, prices in cottonseed oil futures began a drastic decline to a point where on November 20, 1963, the Produce Exchange liquidated all cottonseed oil futures contracts at an arbitrary price roughly \$.02 per pound lower than the price on November 14, 1963 (J.A. 99, 101, 102, 158). In soybean oil futures, a similar situation occurred and Haupt's position on the Chicago Board of Trade was liquidated at a substantial loss (J.A. 99, 101, 102).

When De Angelis and his companies were unable to meet the margin calls resulting from the price declines, the losses involved became Haupt's losses (J.A. 102, 233-234). In both soybean oil and cottonseed oil Haupt became liable for the sums which De Angelis failed to supply (J.A. 102, 234, 242). During this period approximately \$22,000,000 was paid by Haupt to the exchanges (J.A. 53, 102, 243, 245). These millions were paid by the exchanges to the short sellers and others who had profited on the plunging futures markets (J.A. 99, 102, 243-244).

The Chicago Board of Trade and New York Produce Exchange are charged by the Commodity Exchange Act (7 U.S.C. Sections 1-17a, as amended) with a duty to regulate futures trading (J.A. 97, 235-236). If an exchange fails to do its statutory duty in this respect, its designation as a contract market may be revoked (J.A. 103). Moreover, while the Commodity Exchange Act basically envisions a system of self-regulation, the Commodity Exchange Authority has the responsibility of overseeing the operations of the contract markets (J.A. 59, 101, 257). The current 21(a) examination was commenced to enable the Trustee to inquire into the causes of action which the bankrupt might have against the Produce Exchange, the Board of Trade, or both, as well as various members of and traders on said exchanges (J.A. 57-58, 102-105, 183-184, 193-194). Since soybean oil trading (Chicago) and cottonseed oil trading (New York) are economically entwined, in order to ascertain the bankrupt's rights and possible causes of action, the Trustee must examine into both markets (J.A. 56-57).

### **Statement of Points of Cross-Appellant**

The District Court erred in providing that the denial of the Secretary of Agriculture's Petition For Review

of the Referee's order denying his motion to quash or modify the subpoena *duces tecum* was "without prejudice to petitioner's contentions" (J.A. 270).

### Summary of Argument

1. The legal effect of the District Court's Order of July 20, 1966 was to confirm the Referee's Order of May 10, 1966 denying the Secretary's motion to quash or modify the subpoena and at the same time reserving the right to lodge a formal claim of privilege. It is an appealable order.

2. On the merits, the Trustee is entitled to have the subpoena enforced so as to require the forthwith production of the documents.

(a) The Trustee has made the requisite showing of good cause to warrant production of the documents sought. *Boeing Airplane Co. v. Coggeshall*, 108 U. S. App. D.C. 106, 280 F. 2d 654 (1960).

(b) The subpoena is neither unreasonable nor oppressive, but is reasonably circumscribed in view of the complexities attending the Haupt bankruptcy and the administration of the estate. *Westinghouse Electric Corp. v. City of Burlington, Vermont*, 122 U. S. App. D.C. 65, 351 F. 2d 762 (1965). The description of the documents contained in the subpoena is adequate to permit their identification and as such meets the requirement of designated documents produceable under Rule 45(b) of the Federal Rules of Civil Procedure.

(c) Section 8 of the Commodity Exchange Act relates to voluntary publication and does not prohibit production in response to a subpoena *duces tecum*. *Rosee v. Board*

*of Trade of the City of Chicago*, 35 F.R.D. 512 (N.D. Ill. 1964), 36 F.R.D. 684 (N.D. Ill. 1965). Exceptions to Section 8 clearly authorize disclosure of the documents sought herein in the discretion of the Secretary. *A fortiori*, the documents are available by subpoena *duces tecum*.

3. No formal claim of privilege having been lodged, the objections on the ground of governmental privilege are premature and irrelevant to this appeal.

## ARGUMENT

### I.

**The documents sought are all relevant and essential to the Trustee's investigation of the bankrupt's claims.**

The Referee in Bankruptcy and the District Court properly concluded that the Trustee had made the requisite showing of good cause in that the documents sought were relevant to the "acts, conduct or property" of the bankrupt and necessary for the Trustee to carry out his obligations under the Bankruptcy Act (J.A. 195, 198).

#### **1. Analysis of the documents sought.**

An analysis of the documents sought by the subpoena *duces tecum* indicates their relevance to the Trustee's inquiry and the necessity for the examination of these documents by the Trustee in the discharge of his duties under the Bankruptcy Act.

The daily reports called for by paragraphs 1, 2 and 3 in the Schedule of Documents are forms filed with the Commodity Exchange Authority by clearing members, futures commission merchants and foreign brokers, and

traders. These filings are required by the Act and disclose the daily trades and positions of the reporting firms. The only place where all these report forms can be examined is the C.E.A.

The Trustee needs to examine the daily reports in order to determine the manner in which trading was conducted during the pertinent period and whether any provisions of the Act were violated. These reports will reveal who was trading, in what amounts, whether on the exchanges or ex-pit, and whether the trading was consistent with normal business operations. The report forms filed by traders also show whether the position taken is claimed to be speculative or hedging and the quantity of the commodity delivered and received in fulfillment of the contracts.

The communications called for in paragraphs 8, 9, 10 and 11 of the Schedule of Documents will reveal what information the exchanges, traders and brokers supplied to and received from the C.E.A. concerning the transactions and market positions of De Angelis and others. This is important to the Trustee in analyzing the daily reports and to supplement the other Sec. 21(a) examinations taken in New York and Chicago. Knowledge of the information possessed by the exchanges is essential to determine whether they acted properly in discharging their duty to regulate the markets. Knowledge of the information possessed by commodity traders and brokers is essential to determine whether they and their firms acted on the basis of inside information and whether they acted properly as regards their trading activities and service upon the exchanges during the period involved.

The investigation material sought in paragraphs 6, 12, 13, 17, 18 and 19 of the Schedule of Documents consists of the source materials obtained by the Secretary in the

course of investigations conducted pursuant to the Act. During the relevant period and thereafter, various agencies of the Department of Agriculture conducted interviews and obtained documents relating to operations of the exchanges and transactions thereon, many of which may no longer be available. These were essential to the investigation made by the Department of Agriculture and are, of course, similarly required by the Trustee.

Paragraphs 12 and 13 seek historical information from the Department as to prior regulatory failures and other violations of the Act by dealers and operators on the exchanges. These are necessary to place the November 1963 debacle in its proper setting so as to determine whether the actions taken were reasonable and proper and whether the regulatory function was adequately discharged.

## **2. The standard of good cause.**

In *Boeing Airplane Co. v. Coggeshall*, 108 U. S. App. D.C. 106, 280 F. 2d 654 (1960) this Court defined the showing necessary to meet the requirement of good cause.

“‘Good cause’ may ordinarily be sustained by a claim that the requested documents are necessary to establishment of the moving party’s claim or that denial of production would cause the moving party ‘undue hardship or injustice’.” (108 U. S. App. D.C. at 111; 280 F. 2d at 659.)

The showing that is necessary to satisfy the requirement of good cause has been described by Professor Moore in the following fashion:

“Generally speaking, however, there should be a showing that the documents sought to be inspected will in some way aid the moving party in the preparation of his case; that the documents are relevant

to the issues; that the moving party must establish his claim or defense by documents, most of which are in the adverse party's possession; or that denial of production would unduly prejudice the preparation of the party's case or cause him hardship or injustice. That production at the trial would be cumbersome and time-consuming is a reason for ordering production and inspection under Rule 34", 4 *Moore*, Federal Practice, ¶34.08, p. 2450 (2d ed. 1963).

In an examination conducted pursuant to Section 21(a) of the Bankruptcy Act, even less would be required to sustain a showing of good cause because such examination has historically been viewed as a "fishing examination" whose aim is to make available the power to summarily inquire into the existence of assets and provide a means of investigation calculated to lead to the discovery and recovery of a bankrupt's assets. See *In re Foerst*, 93 Fed. 190 (S.D.N.Y. 1899); *In re Insull Utility Investments, Inc.*, 27 F. Supp. 887 (S.D.N.Y. 1934); *In re Autocue Sales & Distributing Corp.*, 151 F. Supp. 798 (S.D.N.Y. 1957).

Significantly, the Referee found that the documents sought were "essential to the investigation being undertaken by the Trustee" (J.A. 195), and "that the records and documents in the possession, custody and control of the Secretary of Agriculture must be made available to the Trustee in Bankruptcy in order for him to properly perform his obligations under the Bankruptcy Act" (J.A. 198). These findings are not challenged by the Secretary and are more than adequate to satisfy even the most stringent requirement of good cause.

### 3. There is no other place to obtain the documents.

The Secretary also relies on his claim that he is not a party and that the documents could be obtained elsewhere



as indicating that the Trustee cannot make the requisite showing of good cause.

The Trustee's investigation is being conducted pursuant to Section 21(a) of the Bankruptcy Act and, as such, there are no "parties" to whom the Trustee can turn to obtain the desired documents. The purpose of a 21(a) examination is to aid in the discovery of assets and to assist in all particulars in the administration of the Estate. *In re Eastern Utilities Investing Corp.*, 98 F. 2d 620 (3rd Cir. 1938). To accomplish this purpose, an examination under Section 21(a) may be had at any time during the pendency of the proceedings. *In re Bryant*, 188 Fed. 530 (D. Pa. 1911); see also *In re C. G. Grove & Son*, 7 F. 2d 228 (D.W. Va. 1925) *aff'd sub nom. Martin v. Breckenridge*, 14 F. 2d 260 (4th Cir. 1926). Clearly, as long as the examination concerns the acts, conduct or property of the bankrupt, which is not disputed here, the fact that the examination is for the purpose of securing information regarding the prosecution of pending suits by the Trustee does not render the inquiry objectionable. *In re Cliffe*, 97 Fed. 540 (D. Pa. 1899); *In re Underwriters Finance Corp.*, 13 F. Supp. 690 (S.D.N.Y. 1935). As stated in *In re Paramount Publix Corp.*, 82 F. 2d 230, 233 (2d cir. 1936):

"To allow an investigation to discover what property the Bankrupt might have, and still to disallow an examination where the process of recovery on a claim has gotten under way, would be an absurd result."

If anything, the fact that the documents sought may be of aid in a proceeding instituted by a Trustee would militate in favor of production. *Ipsa facto*, it demonstrates that there is good cause.

The Secretary incorrectly assumes that the Trustee would be able to obtain the documents sought from the parties to the New York action brought by the Trustee (J.A. 222-253). Many of the documents sought in the instant subpoena are in the exclusive possession, custody or control of the Secretary and could not be obtained from the defendants in the New York action. As regards other categories of documents, particularly the daily reports, the Secretary is the only person having possession, custody or control over all such documents and is the only source at which all such documents are centrally located. Moreover, there is no requirement in the Act that the daily reports be maintained by the persons who must file them. Thus, there is no guarantee that they could be obtained in the New York action. Even so, the defendants in the New York action would only possess relatively few of those reports and to obtain them from a source other than the Secretary would require the Trustee to subpoena the records of hundreds of persons, firms and corporations located throughout the country. It would be a practical impossibility to obtain all these daily reports from any source other than the Secretary (J.A. 155-156).

Equally important, the subject matter of the instant proceeding is significantly broader than that involved in the New York action. That case involves claims by the Trustee for losses sustained by the Bankrupt in *cottonseed oil* futures trading on the New York Produce Exchange, whereas the subject matter of the instant proceeding also relates to events in *soybean oil* futures on the Chicago Board of Trade. No amount of discovery involving the defendants in the New York action will provide the Trustee with the information he requires concerning events in soybean oil futures on the Chicago Board of Trade.

It would indeed be anomalous if the filing of an action against some defendants precluded the Trustee from continuing his investigation to discover additional evidence as regards those already involved and others against whom claims could be asserted.

It is, moreover, difficult to understand how the Secretary would benefit if documents claimed to be relevant to the New York action were sought from him in that action rather than in the instant proceeding. The instant proceeding is broader in scope than the subject matter of the New York action. Thus, even if the documents in his possession which are relevant to the New York action were sought from him in that action, it would still be necessary to continue the instant proceeding as regards other documents in his possession, custody and control. Clearly, to follow this suggestion would only serve to further delay matters and increase the cost of obtaining production for the Trustee and at the same time magnify the alleged inconvenience to the Secretary in complying with the subpoena. Surely, such a cumbersome procedure is not called for where the documents have all been found to be within the scope of the examination in which they are presently sought.

## II.

**The subpoena is as limited as the circumstances permit and there has been no showing that it is burdensome and oppressive.**

The subpoena *duces tecum* is no broader than the relevant subject under investigation. The Referee in Bankruptcy clearly considered that its scope was proper. He said:

"The subpoena is broad and sweeping in its scope. It has to be because of the subjects under consider-

ation. But by subject matter it is as limited as it can possibly be. The fact that a great number of documents are involved is indicative of the fact that a great number of documents were required by the government to regulate and 'police' this market. If it was necessary for the government to accumulate these documents in this endeavor, then it is necessary for the trustee to have access to them in order to fulfill his duties" (J.A. 197).

The Secretary asserts that the subpoena is burdensome because extensive procedures would be required to comply with the subpoena. But the Secretary also says that an investigation has already been made of this entire subject (J.A. 256-259). It is hard to believe that the Department of Agriculture has not already segregated the documents in its files relating to the single largest debacle in the history of commodity futures trading in the United States. Such segregation would be needed in its investigation and for the use of other Government agencies.

In any event, the rule in this Circuit is clear that merely raising the shibboleth that the subpoena is burdensome and oppressive does not dispose of the matter. Thus, in *Westinghouse Electric Corp. v. City of Burlington, Vermont*, 122 U. S. App. D. C. 65; 351 F. 2d 762 (1965), involving a motion to quash a subpoena *duces tecum* served upon a representative of the Attorney General this Court stated, at pp. 766-767:

"The Government contends that the subpoena should be quashed on the grounds that it is unreasonable and oppressive. Fed. R. Civ. P. 45(b). The burden of proving that a subpoena *duces tecum* is oppressive is on the party moving for relief on this ground. 5 Moore Para. 45.05 [2]. The burden is particularly heavy to support a 'motion to quash

as contrasted to some more limited protection.' Horizons Titanium Corp. v. Norton Co., 290 F. 2d 421, 425 (1st Cir. 1961) \* \* \*."

*"The fact that these are very important cases with large sums of money at stake is relevant in determining the reasonableness of the subpoena. Even though the subpoena is addressed to a non-party, inconvenience occasioned by compliance with the subpoena is not a sufficient reason to quash. Cf. Pathe Laboratories, Inc. v. DuPont Film Mfg. Corp., 3 F.R.D. 11 (S.D. N. Y. 1943); 5 Moore Para. 45.05 [2]. Since the subpoena is addressed to an officer of the United States, it might be difficult to require appellants to bear the cost of the search; but the paramount interest of the Government in having justice done between litigants in the Federal courts militates in favor of requiring a great effort on its part to produce any documents relevant to a fair termination of this litigation. (Emphasis supplied.)*

If the subpoena imposes an undue burden on anyone, it is imposed on the Trustee since he is the one who must examine all the documents produced in response thereto. Also mitigating the Secretary's alleged burden, of course, is the fact that the Trustee has offered to review the documents at the various locations at which they may be found and the fact that the Trustee does not seek the right to copy all the documents but merely the right of inspection. The Trustee has also offered to pay the costs involved (J.A. 172-173).

The Secretary has failed to meet his burden of showing that the subpoena *duces tecum* is unreasonable and oppressive.

First, the subpoena clearly meets the requirement that the documents sought be "designated". Professor Moore

states that the purpose of the requirement of designation is to enable a reasonable man to know what documents or things are called for. 4 Moore, Federal Practice, para. 34.07, p. 2448. Designation by category is clearly sufficient and the categories themselves need only be defined with reasonable particularity. 4 Moore, Federal Practice, para. 34.07, pp. 2447-2448. The subpoena need only specify with reasonable particularity the subjects to which the documents called for relate. *Brown v. United States*, 276 U. S. 134, 143 (1928). The documents are readily identifiable; the Secretary understands what is requested and there is no ambiguity. The subjects to which the documents called for relate have been described in considerable detail.

Second, the Secretary's objection to the use of the word "all" and the definition of the word "document" is not well founded. The definition of "document" contained in the subpoena is precisely like the definition of document sanctioned by Congress in the Antitrust Civil Process Act which gives the Attorney General the right to demand documents from a person under investigation for a violation of the antitrust laws. 15 U.S.C. §§1311-1314. Surely it cannot be the Government's position that such a definition is proper when documents are sought by it but improper when documents are sought from it.

More important, the cases relied on to demonstrate the alleged unreasonable and oppressive nature of the instant subpoena are inapposite. With the exception of one lower court case, *Sheffield Corp. v. George F. Alger Co.*, 16 F.R.D. 27 (S.D. Ohio 1945), the Secretary cites no authority for the proposition that the use of the word "all" in and of itself renders the subpoena objectionable. In innumerable situations, subpoenas calling for "all" documents have been sustained. See, e.g., *Lindsay v.*

*Prince*, 8 F.R.D. 233 (N.D. Ohio 1948); *Henz v. United States*, 9 F.R.D. 291 (N.D. Cal. 1949); *Hirshhorn v. Mine Safety Appliances Co.*, 8 F.R.D. 11 (W.D. Pa. 1948); *Hawaiian Airlines, Ltd. v. Trans Pacific Airlines, Ltd.*, 8 F.R.D. 449 (D. Hawaii 1948).

In each case cited by the Secretary, there were other considerations which led the Court to quash the subpoena. Thus, in *Continental Distilling Corp. v. Humphrey*, 17 F.R.D. 237 (D.D.C. 1955) the Court held that no showing of good cause had been made and that much of the material sought was privileged and confidential, and in *Public Administrator of the Courts of New York v. Rogers*, 26 F.R.D. 118 (S.D.N.Y. 1960) the Court was clearly influenced by its determination that the plaintiff was merely trying to obtain the work product of the lawyers in the Office of Alien Property, and that the precise identity of the documents sought could have been ascertained in the first instance by proper use of interrogatories. Finally, while the Court in *Hale v. Henkel*, 201 U. S. 43 (1906) held that a subpoena commanding a witness to appear before a Grand Jury with what the Court characterized as virtually all of his company's books and records should be quashed, the Court also recognized the fact that many if not "all" of the documents sought may ultimately have been required but that some necessity must be shown or some evidence of their materiality produced to justify the order.

In short, there is no rule that a subpoena is burdensome and oppressive because of the word "all".



## III

Section 8 of the Commodity Exchange Act does not prohibit production of documents in response to a subpoena *duces tecum*.

The Secretary states that his principal objection to the subpoena is that it demands vast numbers of documents which Congress has determined to be confidential under Section 8 of the Commodity Exchange Act, 7 U.S.C. §12 (Appellant's Brief p. 47). That section, he claims, prohibits the production of the documents called for in the subpoena. To support this claim, the Secretary principally relies upon his contention that the materials sought in various paragraphs, and particularly the daily reports, which comprise by far the vast bulk of the documents sought, would reveal the business transactions and trade secrets or names of customers of persons trading on the commodity markets and the fact that Section 8 and its predecessors have been construed by the Department of Agriculture for more than 40 years as prohibiting disclosure of business transactions and trade secrets or names of customers of any person except as necessary in proceedings under the Act or as specifically authorized by the Act.

Section 8 of the Commodity Exchange Act provides, in pertinent part:

"For the efficient execution of the provisions of this Act, and in order to provide information for the use of Congress, the Secretary of Agriculture may make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade, whether prior or subsequent to the enactment of this Act, and may publish from time to time, in his discretion, the

result of such investigation and such statistical information gathered therefrom as he may deem of interest to the public, except data and information which would separately disclose the business transactions of any person and trade secrets or names of customers."

Initially, it should be noted that the Secretary's interpretation of Section 8 extends the prohibition of the section beyond the clear words of the statute. Thus, the prohibition against the publication of data and information disclosing individual business transactions, trade secrets or names of customers is limited by the words of the Act to publication of data and information of such type obtained as the result of an *investigation* undertaken by the Secretary of Agriculture regarding the operations of Boards of Trade. There is no prohibition expressed in the Act as regards the publication of data and information required to be filed with the Secretary on a regular basis.

More important, Section 8 is couched in terms of publication. In that section, the Secretary is given discretionary authority to *publish* certain types of information but not other types of information. By its very terms, the prohibition relates only to voluntary disclosures by the Secretary. Thus, even if the prohibitions of Section 8 were applicable to the daily reports as contrasted with information gathered by the Secretary in investigations, Section 8 would in no way prohibit the production of documents in response to a subpoena *duces tecum*.

While the Secretary disputes these contentions, he cites no authority which would compel a contrary conclusion. *Bartlett Frazier Co. v. Hyde*, 65 F. 2d 350 (7th Cir.) *cert. denied*, 290 U. S. 654 (1933) upheld the constitutionality of the Grain Futures Act requirement of filing

reports. But nowhere in that case is there any holding that Section 8 prohibits production in response to a subpoena *duces tecum* validly served upon the Secretary.

On the other hand, in *Rosee v. Board of Trade of City of Chicago*, 35 F.R.D. 512 (N.D. Ill. 1964); 36 F.R.D. 684 (N.D. Ill. 1965), it was held that Section 8 does not prohibit the production of documents in response to a subpoena *duces tecum*. In that case, as it first arose, the Court ruled on and rejected the contention that production of documents pursuant to a subpoena was prohibited by Section 8 of the Act, stating, at page 515:

"While the section restricts the data which the Secretary of Agriculture may 'publish' *its language would not appear to relate to disclosures pursuant to discovery proceedings under the Federal Rules of Civil Procedure and subject to supervision by the Court. Disclosure in these instances is not a publication.* By protective order, the Court can limit the use of the information as is appropriate. Moreover, documents produced on discovery are not open to the public and even if subsequently received in evidence may be withheld from public inspection if necessary.

"Where Congress has intended to proscribe the use of government-held data in judicial proceedings, it has not talked in terms of 'publish' or 'publication.' Rather, it has expressed the prohibition explicitly. See e.g., Federal Aviation Act of 1958, §701, 49 U.S.C. §1441(e); Act of May 6, 1910, c. 208, §4, 36 Stat. 351 (1910), 45 U.S.C. §41 (railroad accident investigations); Act of August 10, 1956, c. 1041, 70A Stat. 748 (1956), 10 U.S.C. §7724 (information regarding naval vessels); P.L. 85-857, September 2, 1958, 72 Stat. 1236 (1958), 38 U.S.C. §3301 (information in Veterans' Administration records).

"It should be noted that some of the information here sought relates to transactions five or more years ago. Some also may clarify one way or the other plaintiff's charges of misconduct against subordinates in the Department of Agriculture. *The language of Section 8 does not, in the Court's opinion, warrant the conclusion that Congress intended to preclude examination of such documents in judicial proceedings.*" (Emphasis added.)

Apart from the foregoing, the Secretary himself recognizes certain exceptions to the prohibition against voluntary publication contained in Section 8 of the Act. One such exception, 7 U.S.C. §12a(6), provides that the Secretary is authorized:

"\* \* \* to publish, notwithstanding the provision of Section 8 of this Act, the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgment of the Secretary of Agriculture disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers and consumers."

It is generally conceded that the market operations to which the documents relate disrupted the market and were inimical to the public interest. In view of this, the basis for any refuge which the Secretary might have taken in the prohibition against publication contained in Section 8 is vitiated. If the Secretary is concededly authorized to publish the information contained in these documents on a discretionary basis, he can hardly seriously contend that their production cannot be compelled by a Court.

Another exception to the requirement of confidentiality



expressed in Section 8 is contained in 7 U.S.C. §12-1 which provides:

"Notwithstanding the foregoing provisions of this section or of any other law, the Secretary of Agriculture may, in his discretion, from time to time, disclose and make public the names and addresses of all traders on the boards of trade on the commodity markets with respect to whom the Secretary has information, and any other information in the possession of the Department of Agriculture relating to the amount of commodities purchased or sold by each such trader; and when requested by any committee of either House of Congress, acting within the scope of its jurisdiction, shall furnish to such committee and make public the names and addresses of all traders on such boards of trade with respect to whom the Secretary has information, and any other information in the possession of the Department of Agriculture relating to the amounts of commodities purchased or sold by each such trader."

Here too, the Secretary's specific discretionary authority to disclose and make public the information would seem to preclude reliance upon a prohibition against publication as the basis for refusal to comply with a subpoena *duces tecum* authorized by a court of competent jurisdiction.

Moreover, even if the question of production were discretionary, which it clearly is not, the grounds upon which the Secretary predicates his refusal to exercise his discretion are ill conceived.

Thus, there is no requirement that documents produced in response to a subpoena *duces tecum* be made available to the public generally. In advancing this contention, the Secretary overlooks the power of the Court to draft an appropriate protective order under Rule 30 (b) of the

Federal Rules of Civil Procedure. To the same effect are the Secretary's contentions that disclosure here would afford certain persons an unfair competitive advantage and diminish confidence in the ability to keep information confidential so as to prejudice administration of the Act. Clearly, there are no trade secrets involved in the instant matter and the trades with respect to which information is sought occurred three or more years ago. None remain open at this time and no unfair competitive advantage would accrue to anyone inspecting the details of these trades at this time. Nor would the ability to administer the Act be prejudiced by disclosure herein. Both of these facts were recognized by the Referee in Bankruptcy (J.A. 196-197) and in the second *Rosee* case, 36 F.R.D. 684 (N.D. Ill. 1965) where the Court states, at pp. 690-691:

"\* \* \* The Authority, however, suggests two additional reasons for non-disclosure. The information contained in the audits relates, in part, to the trades and trading positions of various individuals, many of whom are not defendants in the instant case. First, the Authority restates its position that §8 of the Commodity Exchange Act, 7 U.S.C. §12, prohibits the publication of such data. This contention was considered fully and disposed of in our earlier opinion. Disclosure pursuant to discovery proceedings is not a 'publication', as that term is used in the Act. Second, the Authority points to its obligation to traders and to the general public, suggesting that confidentiality is required in order to assure the accuracy of reported data and to protect the business privacy of 'hedgers' and 'legitimate capitalists', enabling them to engage in hedging and other speculative transactions necessary to the maintenance of stable commodity markets.

"These considerations, while important, have little relevance under the circumstances of this case. *The*

*Authority has sufficient investigative authority and sanctions at its disposal to assure the accuracy of required reports and records. The information sought by the plaintiff involves activity which took place from four to six years ago. None of the trades remains 'open' as of this date and the data would in no way compromise the positions of persons currently trading. If the Authority has any reason to believe that disclosure of these documents will have specific adverse effects, it may submit a draft of a protective order to prevent any possible misuse of the information to be supplied." (Emphasis supplied.)*

Finally, the Secretary's attempts to distinguish the *Rosee* cases, *supra*, have no basis in fact or in law. He contends that the *Rosee* case should be distinguished from the instant matter since the Government was involved in *Rosee* by virtue of the fact that two of the defendants named in that case were employees of the Commodity Exchange Authority and upon the further ground that the number of documents sought by the subpoena in that case was quantitatively less substantial. In addition, it is also alleged that the Court in *Rosee* did not consider the ruling of the Court in *Bartlett Frazier Co. v. Hyde, supra*.

As has been demonstrated, the Court in *Bartlett Frazier Co. v. Hyde, supra*, did not consider whether production pursuant to a subpoena *duces tecum* was a publication within the meaning of the Act and, thus, that case is not controlling.

So too with the other facts upon which the government relies in its effort to distinguish the *Rosee* cases.

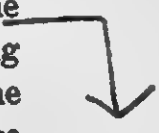
First, that the subpoena in *Rosee* called for quantitatively fewer documents has no bearing upon whether production in response to a subpoena *duces tecum* is pro-



hibited by Section 8. It relates only to the question of whether the subpoena is burdensome and oppressive and whether good cause can be shown for requiring production. That the instant subpoena is reasonably circumscribed and that good cause has been shown for the production of the documents called for has been discussed above and will not be repeated here.

Secondly, the Secretary mistakes the significance of Government involvement in the *Rosee* case. The fact of governmental involvement in no way affected the court's interpretation of Section 8 of the Act. Rather, its significance was founded upon the fact that a claim of governmental privilege was asserted in *Rosee*. This is so because the law as to whether or not a claim of governmental privilege will be sustained differs in cases where the Government is a party and where it is not. See *United States v. Andolschek*, 142 F. 2d 503 (2d Cir. 1944); *Fleming v. Bernardi*, 4 F.R.D. 270 (D. Ohio 1941); *O'Neill v. United States*, 79 F. Supp. 827 (E.D. Pa. 1948); *Bank Line v. United States*, 76 F. Supp. 801 (S.D.N.Y. 1948).

Even so, issue could be taken with the Government's assertion that it is not involved in the instant matter. The Government was intimately involved in the events leading up to and culminating in the failure of Allied and the bankruptcy of Haupt (J.A. 59-62). Thus, attempts were made by the Produce Exchange to obtain information from the Commodity Exchange Authority during the critical period; communications were had between officials of the Produce Exchange and officials of the Authority; recommendations concerning regulation of the market were made by the Administrator of the Authority to officials of the Produce Exchange; and the head of the Foreign Agricultural Service of the Department of Agricul-



ture played an important role in determining the business which Allied could obtain and the financing which would be extended to Allied by its principal financiers (J.A. 59-61).

It is submitted that if involvement were the test of the Secretary's ability to withhold documents, which it clearly is not in the absence of a formal claim of governmental privilege, very few persons would be more "involved" in the entire matter than the Government.

#### IV.

**The various claims of privilege are premature since no formal claim of privilege has been lodged.**

In a further attempt to withhold production of the documents, the Secretary asserts that many of the documents sought are the subject of well recognized privileges against disclosure (Appellant's Brief, pp. 44-46). Thus, he states that many of the documents called for contain intra-agency and inter-agency advisory opinions and matter going to policy considerations; that many of the documents contain information given to the agency with the understanding that it would be held confidential; that there is applicable to some of the documents sought the privilege which protects an attorney's work product; and, that some of the matters within the apparent scope of the subpoena are pending in the Department of Justice where they are under consideration for possible institution of civil or criminal action so as to make the documents pertaining to such investigations privileged from disclosure.

The irrelevance of the above contentions to the instant case is conceded by the Secretary in the same breath in which he seeks to invoke their protection. Thus, the

Secretary concedes that the documents which are the subject of the specific protections referred to may only be found privileged within the context of a formal claim of privilege. A formal claim of privilege has not been lodged in this case.

Obviously, neither the Referee nor the District Court was in a position to determine any question of executive privilege "until there had been a formal claim of privilege". *United States v. Reynolds*, 345 U. S. 1, 10 (1953). Moreover, while an attempt is also made to invoke the attorney's work product rule, such claim would clearly not relate to all of the documents sought and, thus, could not be invoked without consideration of the specific documents toward which such a claim is directed.

In short, it would have been improper as well as impossible for the Referee or the District Court to rule on claims comprehended by the governmental privilege in the absence of a formal claim of privilege by the Secretary or to rule on claims relating to specific documents without consideration of those documents. At the same time, the District Court apparently concluded that the Secretary should be left free to make a formal claim of privilege if he so desired.

This would appear to be the purport of the "without prejudice" clause in the District Court's Order of July 20, 1966. It so, the Trustee has no objection thereto. However, the Trustee does contend that the Secretary should not be permitted to relitigate below the questions of whether Section 8 prohibits production of documents; whether the Trustee showed good cause, or whether the subpoena *duces tecum* was burdensome and oppressive.

It seems apparent that these questions which were fully argued and briefed to the Referee (J.A. 63-183), which were the subject of an extensive opinion by the Referee

(J.A. 183-200), and which opinion was affirmed by the District Court, are the law of this case, subject, of course, to this appeal. The Secretary should not be permitted to relitigate these questions.

The Trustee's appeal from the District Court's Order of July 20, 1966 is solely directed to this point and was made out of an abundance of caution to assure that his substantive ruling was before this Court.

### CONCLUSION

In view of the foregoing, the decision of the District Court should be affirmed insofar as it sustains the order of the Referee in Bankruptcy denying the motion of the Secretary of Agriculture to quash or modify the subpoena *duces tecum*.

Respectfully submitted,

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